

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

NATIONAL HOT ROD ASSOCIATION

and

**Cases 02-CA-185569
 22-RC-186622
 22-CA-190221
 22-CA-192686**

**INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES, MOVING PICTURE
TECHNICIANS, ARTISTS AND ALLIED CRAFTS
OF THE UNITED STATES, ITS TERRITORIES
AND CANADA, AFL-CIO, CLC**

**GENERAL COUNSEL'S POST-HEARING BRIEF TO THE
ADMINISTRATIVE LAW JUDGE**

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I. PROCEDURAL HISTORY OF THE CASE

On September 26, 2016, International Alliance of Theatrical Stage Employees (Union) filed a charge in Case No. 02-CA-185569, alleging violations of Sections 8(a)(1) and (3) of the Act. Thereafter, on October 20, 2016, International Alliance of Theatrical Stage Employees (Petitioner) filed a petition to represent certain employees of the National Hot Rod Association (NHRA) in 22-CA-192686. On December 21, 2016, and February 7, 2017, the Union filed further charges in Case Nos. 22-CA-190221 and 22-CA-192686, respectively.

On November 3, 2016, the Regional Director for Region 22 of the National Labor Relations Board approved a Stipulated Election Agreement to conduct an election by mail ballot from November 15, 2016 to December 2, 2016 to determine whether a unit of employees of the Respondent wished to be represented for purposes of collective bargaining by petitioner. On December 2, 2016 the ballots were counted and the tally of ballots prepared at the conclusion of the election showed that of the approximately **99** eligible voters, 33 votes were cast for and **22** votes were cast against Petitioner, with 17 challenged ballots, a number sufficient to affect the results of the election.

On December 9, 2016, the Employer filed timely objections to conduct affecting the results of the election. On August 4, 2017, the Regional Director for Region 29 issued a letter approving the Petitioner's and the Employer's agreement (1) that challenged voter Michael McNeil was ineligible to vote and that his ballot should remain unopened and uncounted, and (2) that challenged voters Ryan Beck, John Chilcher, Greg Colston, Andre Elferink, Julie Finley, Sage Greenwalt, Antonio Hein-Molina, Ben Kiser J., Suzanne Michaels, Gary Pardo, Joseph Thomas, Robert Tyson, Jonathan Whipple and Allan Wright were eligible to vote and that their ballots should be opened and counted.

On August 16, 2017, a Revised Tally of Ballots was issued; the ballots of these eligible voters were opened and counted, and showed that of approximately 99 eligible voters, 35 votes were cast for Petitioner, 34 votes were cast against Petitioner, and there remained for consideration 2 challenged ballots (voters Nathan Hess and Joshua Piner), a number sufficient to affect the results of the election.

On August 31, 2017, the Regional Director for Region 29 issued an Order Consolidating cases, Consolidated Complaint and Notice of Hearing. Thereafter the Regional Director further consolidated the objections and challenges to the conduct of the election with the Consolidated Complaint for hearing and decision by the administrative law judge.

On December 7, 2017, a hearing opened before Administrative Law Judge Green.

II. STATEMENT OF THE FACTS

A. Respondent's Business Operation

Respondent operates¹ a national series of championship drag racing events, including the professional series known as the Mello Yello Drag Racing Series. The Mello Yello Drag Racing Series is a series of 24 nationally televised professional drag racing events. (Tr.² 210:20-23; 480:14-24). From 2000 – 2015, ESPN produced the Mello Yello Drag Racing televised events for Respondent. (GC Ex.³ 5 ¶2; Tr. 232:9-12; 388:16-22; 484:2-8). In 2016, for the first time in its history, Respondent, itself, produced the Mello Yello Drag Racing Series television program. (Tr. 117:2-4; 232:13-15; 388:23-25; 484:24-25—485:1-3). Respondent had an agreement with

¹ Respondent admitted it meets the Board's non-retail jurisdictional standard and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. General Counsel Exhibit (GC Ex.) 1(q), GC Ex. 1(u), Amended Answer ("ANS."), para. 3. Respondent is headquartered in Glendora, California. (475:24-25—476:1).

² Tr. refers to the transcript followed by the page number being cited, and the transcript line numbers after the colon.

³ "GC Ex." refers to an exhibit admitted into evidence on behalf of Counsel for the General Counsel. Similarly, "ER Ex." as used *infra*, refers to the Respondent's exhibits, and "Pet Ex." as used *infra* refers to the Charging Party Union's exhibits.

Fox Sports to air the Mello Yello Drag Races for the 2016 season. (Tr. 232:13-17; GC Ex. 5 page 2 ¶1).

The drag racing season begins in February and ends in November (the season). (Tr. 117:8-10; 210:24-25; GC Ex. 18). The events take place throughout the country, including in New Hampshire, California, Florida, Phoenix, and Texas. (Tr. 211:25—212:1-4; GC Ex. 18). The drag racing qualifying events typically take place on Thursdays, Fridays, Saturdays and culminate with a final competitive race on Sundays. (Tr. 481:14-19; 539:21-25—540:1).

The employees that Respondent hired to produce the Mello Yello Drag Races for the 2016 season were referred to as the “production crew.” (Tr. 213:22-24). Respondent arranged for the production crew to stay at hotels near the drag racing events. (Tr. 212:5-8; 488:2-7). Some members of the production crew traveled from their homes by plane to the various racing sites. Managers and supervisors typically stayed at different hotels than the members of the production crew. *Id.* Director Jim Sobczak was the only member of management who typically stayed in the same hotel as the production crew. (Tr. 432:3-11).

During 2016, the Respondent leased from F&F Productions, Inc. (F&F) certain equipment, including two mobile trailers, and the services of an engineer to produce the Mello Yello Drag Racing show. (Tr. 347:4-9). William West (West), commonly known as “Billy,” was the F&F Engineer in Charge of the F&F equipment and other engineers in 2016. (Tr. 347:10-23).

B. Key Members of Management

During the 2016 season, Rob Hedrick was the Respondent’s Director of Broadcasting Operations and Post Production Supervisor. (Tr. 695:18-20). Hedrick’s duties included overseeing all post-production supervisions. (Tr. 696:2-6). Hedrick occasionally traveled to

work the NHRA Mello Yello drag racing shows. (Tr. 696:10-12). Jim Sobczak was the Respondent's Director. Brian Stoll was the Respondent's Creative Director who was hired to oversee trade event technical operations. (Tr. 101:4-5; 521:6-9). Stella Marleen Gurrola is the Respondent's Vice President of Human Resources. (Tr. 116:22-23). As part of her duties, Gurrola completed event worker reports to record personnel actions such as terminations. (Tr. 140:9-21). In 2016, Michael Rokosa held the position of Technology Executive. (Tr. 624:13-14). Rokosa's duties included overseeing the day-to-day operation of the Mello Yello races and serving as a point of contact between F&F and Respondent. (Tr. 667:10-16). Kenneth Adelson was the Respondent's Executive Producer; his duties included overseeing the production of video content for the Mello Yello drag racing series. (Tr. 96:16-22). Peter Skorich was the Respondent's Producer in 2016. (Tr. 521:2-3). Skorich's duties included directing employees when to air certain video files. (Tr. 25:21-25—526:1-8).

In 2015, Respondent Supervisors Adelson and Skorich each played a role in hiring production crew employees for the 2016 season. (Tr. 208:9-25—209:1-10; 210:2-12; 389:1-11). The Respondent recruited and hired former ESPN employees, including Nathan Hess and James "Eddie" Dean to work on the Mello Yello Drag Racing Series for the 2016 season. (Tr. 222:12-25—232:1-6). Producer Peter Skorich was Hess' direct supervisor in 2016. (Tr. 208:15-18; 218:15-16; 521:2-3). Adelson was the ultimate decision maker in Hess' termination. (Tr. 104:18-21; 557:5-15).

C. Nathan Hess' Background

The evidence shows that Hess was qualified and experienced in television production. Nathan Hess holds a four-year mass media degree with a concentration in film and television from Washburn University. (Tr. 292:3-12). Hess had been a fan of NHRA racing since he was 8 years old; being a NHRA drag racing fan helped Hess build the knowledge about

the sport that he would later use when he was hired by ESPN to identify drivers and their families for television coverage. (Tr. 231:3-25—232:1-6). Hess worked for ESPN on the NHRA Mello Yello Drag Races for about 9 years in various positions, working all 24 Mello Yello Races each season. (Tr. 232:18-25—234:1-19). In each position Hess held with ESPN, he was promoted and was given more responsibility. (Tr. 234:2-13). Hess testified that he started with ESPN at the bottom of the “food chain” as a utility, where he built cameras, ran cables, assisted camera operators and did whatever he was told. (Tr. 232: 22-25—233:1-3). Hess further testified that he was promoted to the production assistant position, where he spent most of his time archiving video in the truck and served as a liaison between ESPN and NHRA by communicating the show’s needs to the race control. (Tr. 233:3-7). Hess testified production assistant role was similar to Respondent’s utility position in that you follow your superior’s orders. (Tr. 234:4-7). Hess was then promoted to the position of pit producer, where he was responsible for coordinating reporters, camera operators, and the producer. (Tr. 233:10-12). Hess held the pit producer position with ESPN from February 2014 through July 2015. (Tr. 233:19-22). In July 2015, Hess was recommended by ESPN Producer Steve Righteous for the tape producer role which involved more responsibility than his previous roles. (Tr. 234:8-16; 311:2-12). Hess performed the tape producer role at ESPN through the end of the 2015 season. (Tr. 233:23-25—234:1).

In 2015, while Hess was employed by ESPN, Executive Producer Adelson and Producer Skorich observed Hess at his workstation and scouted him to work for the 2016 season. Hess had multiple conversations with Skorich about working directly for the NHRA in 2016. Hess testified that he spoke to Skorich first at the Chicago race in July 2015, and again in October

2015 at the Dallas race. (Tr. 210:2-7). In October 2015, Executive Producer Adelson made Hess a verbal offer to work in the 2016 season. (Tr. 208:25—209:9).

D. Hess' Duties During the 2016 Season

In November 2016, Respondent hired Hess to work as a tape producer⁴ for all 24 events during the 2016 season. (Tr. 208:7-9; 215:9-10; *See also* GC Ex. 19).⁵ Hess worked 18 of the events he was hired to work before Respondent fired him on September 14, 2016, just two days before the start of the second Charlotte event of the Season.⁶ (Tr. 215:11-12; 218:2-14).

Hess' job as a tape producer was to take cues from Producer Skorich and communicate with other graphics and EVS operators when the video should be played to air on television either during a live show or pre-recorded show. Hess performed his job by following a production schedule laid out in the "rundown," a document created by Producer Skorich. The run down is the sequence of the show's scheduled video pieces written out on paper. (Tr. 224:23-25—225:1-3; 267:13-23). Hess gave directions via headset to graphics and EVS operators as to when to have the video named in the rundown sheet ready to play. (Tr. 223:21-25—225:24). Hess routinely received the video used in the show from editors Lauren Adams, Jim Roeder, or Francisco Raposo, whose work station was outside of the truck. (Tr. 269:14-19). Lauren Adams and Jim Roeder were also camera operators. (Tr. 113: 18-23). Camera operators' workstation is located around the race track. (Tr. 214:10-12). Raposo normally worked out of the Respondent's Headquarters in Glendora, California. (Tr. 317:10-12). When Raposo traveled to work the Mello Yello races, he performed his work in the lunch tent on the TV compound.

⁴ In 2016 the Employer used the term Replay Producer and Tape Producer interchangeably to refer to Hess' position. (Tr. 226:4-6); *See also* (Tr. 279:5-23; 280:1-9; Pet. Ex. 7)

⁵ Hess' original job memo shows he was hired for the Pit Producer job but he was later hired as the Tape Producer. *See* GC Ex. 18. Hess testified that he preferred to stay in the tape producer role because that was the last role he held with ESPN. (Tr. 295:25--296:1-4).

⁶ The dates of the second Charlotte race in 2016 were September 16-18. GC Ex 18.

Adams, Roeder, and Raposo used portable media, either a hard drive or a USB stick, to give Hess the video clips that were named in the rundown and would eventually be used in the show. (Tr. 269:8-9; 321:3-11). Hess' duties as tape producer included importing the video he received from editors via the portable media into the EVS network through the X-File 3 machine.

Hess also performed pit producer work during the 2016 season, although Todd Veney, who, unlike Hess, had no pit producer experience, held the pit producer title.⁷ Pit producer work involves directing reporters and camera operators to conduct interviews or report stories around the racetrack. (Tr. 220:10-25). Hess physically sat in the tape producer seat in Mobile Unit A when he did pit producer work. (Tr. 221: 17-22).

E. Respondent Granted Hess a Performance Based Increase in the Midst of a Budget Crisis on September 1, 2016

About two months after Hess was hired Hess began having discussions with Producer Skorich about a raise. The record establishes that Hess was hired at \$50.00 per hour. (Tr. 218:23-24; GC Ex. 19). In early April 2016, Hess testified that he talked with Producer Skorich for the first time about getting a raise. (Tr. 228:9-23). Hess testified that Skorich replied that Respondent first wanted to see more fan friendly “bumps to break,”⁸ driver access, autographs, and that he and Hess could revisit the conversation mid-season. (Tr. 228:14-20). Almost immediately Hess worked to meet Skorich's condition for the raise. Hess testified that after his

⁷ It is undisputed that Todd Veney was hired as pit producer at the start of the season. (Tr. 28:2-3). However, Veney had never done the pit producer work before 2016. (Tr. 28:9; 613:24-25—614:1-5; 618:20-23; 619:6-7). Veney, a drag racer, did not have television production experience. (Tr. 27:25—28:1; 618:24—619:1). Veney's experience with television production was limited to doing statistics on some occasions about 10 years prior to the 2016 season. (Tr. 19:21; 311:19-20). It is also undisputed that Hess had more experience than Veney, and that Hess held the pit producer position with ESPN for almost two full seasons from February 2014 through July 2015. (Tr. 233:19-22). Despite Veney's limited experience, Veney was hired back for the 2017 and 2018 season. (Tr. 27:20-22).

⁸ Bump to break is a sequence of camera shots that is aired going into a commercial break. (Tr. 230:15-23).

conversation with Skorich, Hess had the tape room incorporate more driver access and fan photographs into the show. (Tr. 297:23-25—298:1-3).

Based on the work Hess had done, Hess followed up with Skorich at the mid-season mark to discuss the raise again. Hess testified that in early June 2016, he had another conversation with Skorich about getting a raise. This time, Skorich told Hess that as he had done everything that Skorich asked, Skorich would work on getting Hess a raise. (Tr. 229:1-5). Hess testified that in mid-July 2016, at the Denver Race,⁹ Skorich praised Hess, saying that he was doing a really good job, everything looked good, and Respondent would pay Hess \$55 an hour effective August 1, 2016. (Tr. 229:11-18). Sometime in early August 2016, Skorich changed the raise amount but nonetheless said Hess was due a raise and would be compensated for the difference in next season. Hess testified that sometime in early August 2016, Skorich called Hess and said that Respondent could not pay Hess \$55 per hour, only \$52.50, but that Respondent would make a better deal for next year. (Tr. 309:10-20). Skorich did not provide Hess with a reason for the lesser amount. This testimony is unrebutted.

The evidence establishes that the Respondent viewed Hess as a valuable employee. Hess testified that Skorich praised his work quite regularly by saying things like “good job,” “that was great,” or “keep it up.” (Tr. 276:11-14). Further, it is undisputed that Respondent granted Hess a raise while making budget cuts. The record evidence establishes that on August 29, 2016, Technology Executive Rokosa informed the production crew by email that Respondent was instituting a car pooling system for the remainder of the season in order to control spending, and that car sharing would begin at the Indianapolis race held on August 31-September 5, 2016. (Tr. 670:4-15; GC Ex. 37). Moreover, the record establishes that on September 1, 2016 Executive Producer Adelson sent Respondent CEO Peter Clifford a proposed budget plan which included

⁹ The dates of the Denver race in 2016 were July 22-24. GC Ex 18.

cuts to the the production crew's wages such as a reduction of staff on Fridays, elimination of some tape operators in the tape room, and eliminating overtime. (Tr. 533:3-7; 534:13-16; GC Ex. 2; GC Ex. 5 at page 9 of 16 ¶4). On September 1, 2016, Hess signed a job memo¹⁰ memorializing his increase from \$50.00 per hour to \$52.50 per hour wage increase. (Tr. 226:5-8; GC Ex. 20). Hess earning the \$2.50 increase by incorporating the elements Producer Skorich asked for, and his value as an employee, are the only reasonable explanations for the Respondent granting Hess a raise when other employees' wages were being cut.

F. Production Crew's Truck Guys Work in Close Proximity to Management During 10 hour Work Days

Hess worked long hours because he was producing a show that was affected by multiple variables. Hess testified there were often weather delays or accidents which prolonged the race. (Tr. 211:7-11; 256: 3-6; 394:3-4). During a race weekend, Hess worked on average a minimum 10 hours per day, and sometimes worked as long as 16 hours per day. (Tr. 211:18-19; 241:9-13).

1. Physical Layout of the Television Compound

The nature of the production crew's work environment kept the crew confined to a secure area at the race track. The area was built at the start of the weekend, and disassembled by the end of the race weekend. The racetracks where the Mello Yello drag races take place are located in remote, unpopulated areas because the events are very loud. (Tr. 215:3-8). During race weekends, the racetracks are also very crowded. (Tr. 391:13-16). At each drag racing event, Respondent sets up its operation in what is referred to as the television (TV) compound. The TV compound is a semi-secure area anywhere from 200 or a few thousand feet away from the racetrack, usually near the finish line. (Tr. 214:19-25—215:1-2). The TV compound in 2016 contained two mobile units, Mobile Unit A and Mobile Unit B (collectively "the Mobile Units"),

¹⁰ The Respondent refers to its employment contract as a "job memo." See e.g., GC Ex. 20

that were supplied to Respondent by F&F to serve as a mobile broadcast studio (Tr. 347:2-9). The Mobile Units contained all equipment necessary to produce the Mello Yello Drag Racing show. (GC Ex. 22, Tr. 347:2-9). The TV compound also contained a meal tent where the production crew was served.

Mobile Unit A housed most of the production crew and equipment used to produce the show, as set forth in more detail below. Mobile Unit B housed the graphics team, an engineer, a sub-mix station, and a master control room. (Tr. 242:14-17). The Mobile Units were typically about 10-15 feet apart. (Tr. 252:22-25—253:1-2). Near the Mobile Units were other support trucks like a satellite truck, and the catering tent where meals were served to the production crew. (Tr. 253:3-9). Some production crew members, like camera operators, worked outside the TV Compound around the racetrack shooting video. (Tr. 214:11-15). Other production crew members, including tape operators, technical director, associate producer, and associate director were stationed inside the Mobile Units; the crew members stationed in the mobile units were commonly referred to as the “truck guys.” (Tr. 242:2-8;18-20).

2. Mobile Unit A

Tape Producer Hess worked in Mobile Unit A. Mobile Unit A was a 700 square feet, 53-foot tractor trailer. (Tr. 241:18-22). Approximately 20 people worked in Mobile Unit A during race for the 2016 season. (Tr. 241:25—242:1). Mobile Unit A is made up of two main sections, the tape room and the production area. The tape room and the production area are not enclosed spaces; one can walk straight through the entire truck. (Tr. 249:10-17). The tape room and production area were separated only by a monitor wall that was retractable but was kept open during the 2016 season. (Tr. 650:13-15).

Hess' direct supervisor along with other members of management sat within feet of his work station. Respondent's managers and supervisors were stationed in the production area of Mobile Unit A or the main Production Room.¹¹ (Tr. 244:14-18; 271:14-16). Respondent's managers and supervisors sat in rows often called "benches" in the production area. (GC Ex. 22). Director of Broadcasting and Post Production Supervisor Rob Hedrick (Hedrick), Fox Executive Vice President Frank Wilson, and Technology Executive Rokosa sat in an area of the Production Room called the "back bench." (Tr. 245:18-24—246:2-4). The back bench was the furthest from Hess' station. Fox Sports Senior Coordinating Producer Greg Oldham, Pit Producer Todd Veney,¹² Associate Director Melissa Armstrong¹³, and Executive Producer Adelson sat in the "middle bench." (Tr. 246:5-16). Technical Director Gordon McBride, Director Jim Sobczak (Sobczak), and Producer Skorich sat in the "front bench" or "first bench". (Tr. 246:20-25—247:1-4). The "first bench" was the closest to Hess' station.

Hess worked in an area called the Tape Room, next to the production area. (Tr. 247:5-11). Hess worked shoulder to shoulder in a row of seats next to the EVS (Tape)¹⁴ operators, including EVS (Tape) operators James "Eddie" Dean, David Slain, Paul Lasky and Bob Bracken. (Tr. 247:21-25;249:4-9). EVS Operators are responsible for bringing up video clips for the show, at the direction of the tape producer, Nathan Hess. (Tr. 650:13-15).

Hess' work station was only five feet from his direct supervisor Skorich's station. (Tr. 249:18-21). Hess' worksite was so small that he could hear discussions at the front bench without having to get up, and could speak to Producer Skorich at a normal tone from where he

¹¹ Technology Executive Rokosa referred to the production area as the "control room" or "production control room" in his testimony. (Tr. 555:13-14; 648:11; 650:10, 23; 679:24-25—680:1,10; 682:13).

¹² Todd Veney was not a supervisor or manager.

¹³ Melissa Armstrong was not a supervisor or manager.

¹⁴ Replay, Tape, and EVS are terms that are used interchangeably. (Tr. 235:9-11). Tape is an old term because ribbon is no longer used to play videos. (Tr. 234:20-25;241:6-8). The term "tape" is still used but it now refers to digital video. (Tr. 234:20-25). EVS is a name brand that has become the generic term used refer to a digital replay machine, or the operators of a digital replay machine. (Tr. 235:1-6).

sat. (Tr. 249:19-21; 250: 1-2; 251:2-7). Hess got up from his seat about twice per day over the course of a race weekend to speak to Skorich, and likewise Skorich routinely came into the Tape Room area to talk to Hess about any issues that needed clarification. (Tr. 251:8-25). Hess also communicated with Skorich and other supervisors via a headset. (Tr. 249:22-24).

Toward the back of Mobile Unit A sat two video engineers in an area called the Video Room. (Tr. 248:1-15). F&F engineer West was stationed between the Tape Room and Video Room. (Tr. 248:12-15).

3. Tape Room Equipment

The equipment in the tape room, the EVS (tape) machines and the X-file 3 are relevant to the instant case. The tape room itself houses a number of monitors, routers, a headset station and six EVS machines, which are like large DVR machines (digital video recorders). (Tr. 235: 12-14; 249:24-25—312:1-4; 238:12-16; *See e.g.*, GC Ex. 21). (Tr. 235:7-8). The EVS machines were used for instant replays of moments in the drag racing event. (Tr. 375:1-7). An instant replay is basically a live camera shot that is rewound quickly then replayed. (Tr. 291:5-8). EVS machines can store any video that has been recorded via connected cameras during the show or video of scenery surrounding the racetrack, fan shots, autographs or feature stories which are loaded via USB sticks or hard drives. (Tr. 236:1-25— 237:1-7). EVS machines have the capacity to replay videos and do simple video editing. (Tr. 235:5-6).

The Tape Room also houses the X-File 3 machine. (Tr. 238:17-18; 307:13-15; 425:5-7). The X-file experienced technical problems throughout the 2016 season. Tape Producer Dean and EVS operator Dean often had to trouble shoot it. However in 2016, EVS operator James “Eddie” Dean was normally in charge of operating the X-File 3. (Tr. 269:5-7; 270: 13-15; 412:20-22).

The X-File 3 is the access point for all video to be able to make it onto the EVS Network where EVS operators can then access the video and play it on the show being created. The X-File 3 is used to import and export all video into the EVS network.¹⁵ (Tr. 238:19-21). Pre-produced content must be loaded into the EVS network via the X-File as well. (Tr. 526:3-5). Pre-produced video content is video content created in advance of a show. (Tr. 649:6-8).

Importing and exporting video is the X-File's one and only function. Video content can be loaded into the X-File 3 by inserting an electronic storage device such as a USB stick or external hard drive. (Tr. 237:1-7; 239:4-6; 239:15-20; 270:8-9; 363:7-10). The X-File 3's primary function is to convert video stored on a USB or other electronic storage device from one file format to a file format compatible with the EVS network before the video can make it to air on the show. (Tr. 375:1-4; 408: 24-24—409:1-3; 424:16-20). The conversion of one file format to another is known as "transcoding." (Tr. 239:1-2). Director of Broadcasting operators and Post Production Supervisor Rob Hedrick testified that the Respondent required all files to be transcoded or converted to .MOV format before being transferred onto the EVS network. (Tr. 716:23-25—717:1). Once a file is transcoded, the file can be found on a menu screen on the X-File 3, selected with a mouse, then designated into an electronic filing system on the EVS network. (Tr. 239:10-23; 425:3-15; 655:13-20). Once in the EVS network the video file becomes available for an EVS operator to play on television show. If a file fails to transcode or convert to a .MOV file then file cannot accessed by the EVS operators. The X-file 3 is the only equipment created by the EVS brand to convert files to a format recognizable by its EVS machine network. (Tr. 711:22-25—712:1).

¹⁵ The EVS network is referred to as the "server" at times throughout the hearing. (Tr. 362:5; 648:19; 650:12; 680:20)

The X-File 3 like any other electronic equipment experienced technical issues like the compatibility between the X-File 3 and the EVS machines on the truck. Prior to 2016, when ESPN produced the Mello Yello show, the X-File 2 was used at the Mello Yello Races, not the X-File 3. (Tr. 240:18-23; 300:19-24, 23-24). In 2016, Respondent used the same truck with the same equipment that was used by ESPN in prior years. (Tr. 365:22-25—366:1-6). At the beginning of the 2016 season, engineer West’s technical reports show that there were compatibility problems with the X-File 3 and the EVS machines in Mobile Unit A. (GC Ex 25 at page 1). F&F Vice President Marc Orgera testified that the X-File 3 was newer than the EVS machines on Mobile Unit A and that the EVS machines on the Mobile Unit were compatible with the older X-File 2. (Tr. 357:3-5). Orgera testified that because the X-File 3 was newer than Respondent’s EVS machines, the X-File 3 had to be “dumb[ed] down” to work with the EVS machines on the truck. (Tr. 357:5-7). Technical issues with equipment in the TV production industry are normal. Technology Executive Rokosa admitted that technical issues varied from race to race during the 2016 season. (Tr. 667:17-19).

G. After Complaining All Season Long About Terms and Conditions of Employment Truck Guys, Primarily Former ESPN Crew Began to Engage in Union Organizing in August 2016

Former members of the ESPN production crew, like tape producer Hess and EVS operator Dean, that worked for years on the NHRA races quickly became dissatisfied with NHRA’s below industry standard working conditions. Hess, Dean, and other former ESPN crew members experienced sudden changes in their working conditions. During the 2016 Season, Respondent structured breaks differently than ESPN; Respondent provided a meal at the start of the day whereas ESPN structured meals in the middle of the day (Tr. 253:23-25—254:-10). The truck guys worked 10 hours days. Structuring meals at the beginning of the day meant that the truck guys could go up to 9 hours without food. Respondent also provided fewer meals to the

production crew than ESPN, and Respondent did not pay an hour of overtime for employees working through their breaks as ESPN did. (Tr. 253:11-22; 254:17-21). In addition, Respondent deducted the production crew's per diem from their pay if the crew hotel provided a free breakfast. (Tr; 390:15-22). The deduction of per diem was not a standard practice in the industry. (Tr. 406:11-18). Respondent provided meals are standard in the television production world due to nature of the work environment. (Tr. 254:22-25—255:1-4). The racetracks were in remote and crowded places which made it difficult for the production crew to leave the track to get food. In addition, the truck guys were confined to the Mobile Unit during the duration of the race no matter how many delays there were.

Former ESPN production crew members, like Hess, raised complaints to management in an attempt to improve the production crew's working conditions. Hess testified that at the very start of the season at the first race in Pomona, California,¹⁶ he asked Producer Skorich - in front of everyone in the truck, including the management in production and the tape operators - when lunch was going to be provided. (Tr. 255:11-23). Hess testified that Skorich replied that they were not getting lunch. Hess responded, "Well that's a problem, you need to fix that." (Tr. 255:24-25). Concerns about food among the Truck guys persisted throughout the Houston race¹⁷ in late April, the Norwalk race¹⁸ in June and Denver race¹⁹ in July. (Tr. 256:1-25—257:1-20). Respondent's production crew's dissatisfaction led them to seek Union representation in August 2016. (Tr. 168:9-16).

Consistent with Hess' testimony, Vice President of Human Resources Stella Marleen Gurrola (Gurrola) admitted that Respondent was well aware of all the production crew's

¹⁶The dates of the first Pomona race in 2016 were February 11-14. GC Ex 18.

¹⁷The dates of the Houston race in 2016 were April 29-May1. GC Ex 18.

¹⁸The dates of the Norwalk race in 2016 were June 23-26. GC Ex 18.

¹⁹The dates of the Denver race in 2016 were July 22-24. GC Ex 18.

complaints in the 2016 season starting as early as February/March. (Tr. 490:14-17). Gurrola testified that among the complaints brought to her attention was the production crew's unhappiness with food being provided. (Tr. 489:3-11; 490:1-2). In February 2016, Gurrola learned from the payroll manager that some of the production crew raised complaints by email about the way per diem was being paid as well. (Tr. 490:5-10). In addition, during the first months of the season, safety concerns on behalf of Camera Men were also brought to Gurrola's attention by NHRA management. (Tr. 490:24-25—491:1-4).

H. Hess Emerged as a Leader in Early Stages of Organizing Campaign

Learning that Respondent's crew was unhappy with their working conditions and seeking to organize them, IATSE International Representative and Lead Organizer John Culleeny organized his first meeting with NHRA employees in Seattle, Washington during the August 5-7, 2016 race weekend. (Tr. 167:1-3; Tr. 167:8-20; 258:17-22; GC Ex. 18). Admitted 2(11) Supervisor Creative Director Brian Stoll invited Hess to the first Union meeting. (Tr. 377:24-25—1-7). The evidence establishes that six employees attended his first meeting, including Hess and Dean. (Tr. 168:20-23). Hess was among the small group of employees that sought to improve their working conditions. During the first meeting, employees complained about not being happy with the switch from ESPN producing the show to NHRA producing the show, how they were being treated, and certain of their working conditions. (Tr. 168:9-16). The employees voiced their concerns about the timing of breaks, lack of meals, and safety for crew members that worked outside the TV compound. (Tr. 259:12-14). Hess signed a Union card at the first meeting on August 6, 2016. (Tr. 260:2-7; GC Ex. 23). The other employees that attended the first meeting also signed Union cards. (Tr. 259:17-18).

Culleeny testified that after the first meeting, Hess and EVS operator Dean took the lead in assisting the Union to get authorization cards signed. (Tr. 169:4-7). The evidence shows that

Hess assisted with the Union organizing in other ways as well. Hess testified that he invited production crew members to the next meeting scheduled to take place in Brainerd, Minnesota,²⁰ and relayed messages to the production crew from Culleeny. (Tr. 260:15-2; 261:3-12). Graphics operator Joshua Piner testified that at the Seattle race, he complained to Hess that he did not get breaks to use the bathroom. (Tr. 437:13-24). Piner testified that Hess then invited him to attend the next in Brainerd, Minnesota; Piner testified that he attended. (Tr. 437:25—438:1-3). Hess talked with other production crew members at the production crew hotel, around the TV Compound, and in the truck (Mobile Unit A) about the Union. (Tr. 260:19-24).

The mutually corroborative testimony of Hess and employee Piner establishes that Hess attended the second Union meeting during the race in Brainerd, Minnesota, along with about twenty other employees between August 18-21, 2016. (Tr. 438:7-10; *see also* GC Ex. 18). At that meeting, Union Organizer Culleeny distributed Union authorization cards to employees by electronic link. (Tr. 261:18-24; 262:9-18). Hess distributed about four (4) electronic Union cards by text message following the Brainerd race. (Tr. 262:13-15). Hess garnered the reputation among the crew of being a Union leader and strong supporter who spoke regularly at Union meetings. (Tr. 174:20-22).

Culleeny testified that the next Union meetings he held were during the Indianapolis race weekend on consecutive nights, Friday September 2, 2016 and Saturday September 3, 2016. (Tr. 171: 2-11). Both meetings were held in a private room in the restaurant/bar at the Marriott Indianapolis hotel. (Tr. 171:10-15; 265:8-12; 3236-9). The mutually corroborative testimony of Hess, Graphics operator Piner, EVS operator Dean, and Editor Raposo establishes that Hess was present at both Union meetings during the Indianapolis race weekend. (Tr.265:1-7; 265:13-22;

²⁰ The dates of the Brainerd race in 2016 were August 18-21. GC Ex 18.

266:1-13; 398:5-16; 399:4-6; 400:1-15; 438:19-23; 439:11-12; 322:15-25; 323:4-5, 20-25—324:1). Hess attended every Union meeting that was scheduled before he was terminated.

The record evidence shows that on September 3, 2016, during the Indianapolis race weekend, Hess sent EVS operator Paul Kent a text message with an electronic link to the Union authorization card. Kent responded that it was unlikely that he would be making it to the meeting, texting, “Got it. Probably not going to make it down there tonight back hurts and tired. See you tomorrow.” (Tr.263:6-20; GC Ex. 24). Hess testified that before he sent Kent the Union authorization card, he spoke with Kent on several occasions about supporting the Union, including in 700 square foot truck where they worked, and on car rides to and from the crew hotel and the racetrack. (Tr.264:4-12; 20-25; 306:8-12). Kent testified that he received a link to a website that included a Union authorization card but that he did not sign a card, nor did he go to the website to print out the card. (Tr.203:2-7).

By the end of the second meeting during the Indianapolis Race weekend on September 3rd, Union representative Culleeny strategized with Hess, EVS operator Dean, and Graphics operator Piner to finish getting a majority of the cards collected and to meet again at the next race in Charlotte on September 16-18, 2016. (Tr.175:4-9).

I. The Respondent Learned of Union Organizing During the Indianapolis Race Weekend on September 2, 2016

The record evidence establishes that the Respondent admitted to learning of Union activity during the Indianapolis race weekend. In that regard, Technology Executive Rokosa testified that on a Friday evening, September 2nd, Frank Wilson from Fox Sports approached Rokosa and stated that Wilson and others at Fox Sports like Greg Oldham learned that Respondent’s employees were engaged in Union organizing. (Tr. 637:16-25—638:1). Rokosa testified that he waited until the next morning to tell Executive Producer Adelson because

Rokosa knew Adelson was having a tense day due to the budget crisis. (Tr. 638:4-25). However, Adelson already knew about the organizing campaign when Rokosa told him the next morning. (Tr. 639:12-18).

In addition, Rokosa testified that on the following morning, Saturday, September 3rd, Adelson directed Rokosa to call NHRA General Counsel Linda Louie to alert Respondent of the employees' Union organizing. (Tr. 639:20-25—640:1-5). Rokosa complied. (Tr. 640:1-5).

Vice President of Human Resources Gurrola testified that even though she did not attend the Indianapolis race in 2016, she also learned about the Union organizing drive on September 3, 2016. (Tr. 117:11-13; 22-25—118:1). Gurrola testified that she recalled the date specifically because it was her birthday, and she had to cancel her birthday plans, after she received the call from NHRA Counsel Louie warning her about the Union campaign. (Tr. 117:14-16; 491:12-17).

Adelson claims that he learned of Union organizing on the morning of Sunday, September 4, 2016.²¹ However, record evidence including Gurrola and Rokosa's testimonies indicate that Adelson learned on September 3, 2016. An email written by Adelson to CEO Clifford is telling in this respect. On September 3, 2016, Adelson sent CEO Clifford a follow up email to the September 1, 2016 budget reduction plan regarding additional cost savings measures. (Tr. 98:17-22; GC Ex. 3). Adelson's September 3, 2016 email to Clifford states in part, "A lot has happened here in a day, I'll update you when we talk." (GC Ex. ¶3).

Executive Producer Adelson testified that on the morning of Sunday, September 4, 2016, at the race track, Creative Director and admitted 2(11) supervisor Brian Stoll informed Adelson

²¹ Adelson testified consistently on 611(c), cross examination, and direct examination that he learned from Stoll on the morning of Sunday, September 4, 2016. (Tr. 100:19-25—101:1-9 ("you learned of the organizing drive on the morning of September 4, 2016, isn't that correct? That would be the Sunday. Yes."); 109:25—110:1-4 (Skoll[sic] approached you on the morning of the 4th - - of September of 2016); 536:14-17 ("On Sunday at Indianapolis, when I first got to the track"). However, Rokosa recalls that Adelson informed him about the Union organizing on Saturday morning (which would have been September 3, 2016). (Tr. 639:19-25—639:1-2).

that the production crew employees were engaged in Union activity. Stoll told Adelson that Stoll learned of the Union activity the previous night from employees that he ran into at the hotel over the course of the Indianapolis race weekend. (Tr. 100:19-25—101:1-9; 109:25—1-4; 536:14-17). Adelson testified that Stoll was “watching things happen.” (Tr. 580:12-13). Adelson testified that upon learning of the Union organizing, he asked Stoll for more information, asking “what do we – you know, do you know more? Do you know who? Any information I could have that I be – could process this”. (Tr. 110:14-18). Adelson further testified that Stoll reported to have seen a lot of activity and that he talked to a lot of people. (Tr. 580: 10-12). Adelson admitted that he asked Stoll for any names of anyone he might have seen: “[I] asked him if he knew any names or what else he knew” (Tr. 580:14-17). Adelson further admitted that he asked Stoll the “natural questions” that a supervisor would ask. (Tr. 580: 1-4). Despite Stoll having reported the Union organizing to Adelson the next morning after learning about it and providing Adelson with a detailed report of watching what was going on and speaking to many employees, Adelson nevertheless denied that Stoll provided the names of the employees that Stoll saw or talked to about the Union. (Tr. 536:25—537:1).

Rokosa and Adelson each testified that after he learned that the production crew was engaged in Union activity, he directed Rokosa to tell NHRA General Counsel Linda Louie. (Tr. 101:11-14;537:17-25; 639:20-25).

The record further demonstrates that Director Jim Sobczak knew about the Union meetings, and admitted 2(11) Brian Stoll told Editor Raposo about the Union meetings. Union organizer Culleeny testified that at the first Union meeting he held at the Indianapolis race, a camera man told Culleeny that Director Jim Sobczak was seated at the bar and could see

everyone coming in and out of the Union meeting.²² (Tr. 172:3-18). Graphics operator Piner testified that as he walked out of the Union meeting in Indianapolis, he noticed that Director Jim Sobczak was sitting at the bar. (Tr. 438:19-23; 439:20-23). Piner testified that Sobczak nodded in his direction (Tr. 440:1-2). Likewise, EVS Operator Dean testified that at the first Union meeting he attended during the Indianapolis race weekend, he saw Director Sobczak at the bar right outside where the meeting was being held. (Tr. 399:17-25;422:21-25—423:1-9).

Editor Francisco Raposo testified that admitted 2(11) Supervisor Brian Stoll invited him to a Union meeting during the Indianapolis race. (Tr. 322:15-24). Raposo testified consistently on direct and cross examination that he attended the Union meeting held on Saturday night (September 3, 2016). (Tr. 323:1-6; 332:5-12). Raposo testified that he had a conversation with admitted 2(11) Supervisor Sobczak about the Union, either on Saturday or Sunday, after he attended the Union meeting. (Tr 324: 6-2; 335:1-10; 14-16). Raposo said that Sobczak probably heard about the Union organizing, and that Raposo wanted to know Sobczak's thoughts on the Union. (Tr. 325:1-3). Sobczak told Raposo that if he chooses to unionize, he may get a pay raise but to think about whether he will lose his 401K, health insurance, and to consider if he will remain employed during the off season. (Tr. 325: 22-25—326:1-8). Based on the Respondent's admissions and employees conversations with supervisors about the Union, there can be no question that the Respondent had a lot of information about the employees' union activities.

J. The Respondent Precipitously Fired Hess on September 14, 2016

Hess testified that at no time during or at the end of the Indianapolis race weekend did Respondent counsel, reprimand or discipline Hess for any reason. (Tr. 273:23-25—274:1-8). On September 14, 2016, Hess was preparing to leave the next day to work the Charlotte race, which was scheduled to start on September 16, 2016. (Tr. 274:9-14). Hess had his flight booked

²² The Employer admits in its Answer that Sobczak is a 2(11) supervisor.

and was ready to travel. However, Hess received a telephone call from Producer Skorich in which – out of the blue – Skorich terminated Hess. (Tr. 274:10-16). Hess testified to the conversation as follows:

Q: How did Peter Skorich terminate you?

A: He called me and he said, hey, Nate, this is Pete. I said, hey, what’s going on? He said, I hate to do this, but we’re *going in a different direction* as far as the tape producer position. I said, effective when? He said, effective immediately. I replied, *you are aware that the Xfile went down and that’s why we didn’t have the video we needed for the Indy race? He said, yeah, but there were some other things on Friday and Saturday. And they felt things could have been organized better.* I said, okay. He said, again, I hate to do this, but this is the way we’re going. And he said that he wasn’t sure about getting paid for the weekend because it was last minute but that Rokosa and/or Marleen would be in touch, and we would get that worked out.
(Tr. 274:19-25—275:1-7)

On that same date, Producer Skorich emailed Executive Producer Adelson, Technology Executive Rokosa, Vice President of Human Resources Gurrola, and NHRA General Counsel Linda Louie²³ about Hess’ termination stating,

I told him he could follow up with Mike and or Marleen with any question. I told him that I had some bad news to deliver to him. After our struggles in Indy with the tape room we have decided that we are going to make a change and unfortunately he is no longer part of our future. He asked effective when? I told him effective immediately. He said “you do know we had major equipment malfunction on Sunday morning,”²⁴ ***I told***

²³ The Employer stipulated that Anthony Pavon, Alexander Newman, Charles Couch, and Nathan Hess were the only employees terminated for cause in 2016. (Tr. 165:7-15). The record evidence shows that Couch and Hess were the only two “four cause” terminations after the Employer learned of Union organizing drive. Event Worker Reports for Couch and Hess indicate that both were terminated effective September 7, 2016, for “performance” issues. General Counsel subpoenaed communications related to terminations in 2016. Couch had no communication associated with his termination. Curiously, Hess’ termination was handled differently than Couch such that Hess’ termination had an email notifying in-house counsel Linda Louie about the details of Skorich’s call to Hess.

²⁴ Producer Skorich stated in his email that Hess told him that the equipment failed on ***Sunday*** morning. However, it is undisputed that the live race during the Indianapolis weekend was broadcast on Monday, September 5, 2016. During the hearing, Executive Producer Adelson often referred to September 5, 2016 as “Sunday” rather than Monday. Adelson explained that he did so out of force of habit since throughout the season, the final competitive race of the weekend typically ran on Sundays but the Indianapolis race was an exception; during the Indianapolis

him that I was aware of that but our difficulties were present as early as Friday, things were not able to be found, there was lack of organization and we never want to go through that again. I told him he could follow up with Mike and or Marleen with any question.
(GC Ex. 36) (emphasis added).

The record evidence establishes that Skorich vaguely told Hess that Respondent's reasons for his termination were, "some other things on Friday and Saturday" and "they felt things could have been organized better." Hess was never told that "things could have been organized better" at the Indianapolis race or at any time prior to Indianapolis. (Tr. 275:20-23). Respondent never told Hess that things weren't able to be found or were missing. (Tr. 275:16-19). Respondent presented no evidence to the contrary. Not only did Respondent not counsel, discipline or otherwise tell Hess that they were displeased with his performance at the Indianapolis race, but quite to the contrary, Respondent rewarded Hess with the raise that he and Skorich had been discussing for about five months.

The evidence establishes that Respondent did not actually rely on clips failing to air during the live broadcast on Monday, September 5, 2016 as the reason for firing Hess. The record establishes that Hess asked Skorich if his termination had anything to do with the problems with the X-File failing to convert video for the show. Skorich's response shows Hess' termination had nothing to do with clips not airing. Skorich did not say the Mello Yello Sponsor was upset, video did not air, clips did not air, mention the importance of the Indianapolis race or mention the importance of the video that did not air.

K. X-File 3 Fails to Convert Files at Indianapolis on September 5, 2016

race weekend, the final race was run on Monday instead. (Tr. 571:10-25—572:1). Adelson's testimony offers a logical reason as to why Skorich recorded the wrong day in the September 14, 2016 email. Hess also testified to "Sunday" typically being "race day". (Tr. 251:11-15).

The X-File regularly experienced issues with failing to convert files to a readable format before being able to load files onto the EVS network and being made accessible for air during the show. Hess testified that this happened about three to four times a weekend prior to Indianapolis. (Tr. 273:19-22). Hess or Dean were usually able to trouble shoot the issues but that was not the case on Monday, September 5, 2016.

Hess testified that on Monday, September 5, 2016, he arrived at work for a pre-production meeting around 7:30 a.m. (Tr. 266:21-23; 267:1-2). The purpose of the pre-production meeting was to go through the run down—the sequence of the show written out on paper. (Tr. 267:13-23). Hess testified that his responsibility during the pre-production meetings is to inform management if video is needed for the day's show, assuming that information is available to him at the time of the meeting. (Tr. 289:2-9; 289:15-22). Hess testified that the pre-production meeting is usually held on the truck but when he showed up on September 5, 2016, the truck was locked, which resulted in Hess not having access to his run down sheet during the pre-production meeting. (Tr. 268:2-3; 290:4-7; 300:12-15; 289:10-25—290:1-8). Hess testified that the reason the truck was locked was that the truck engineers were not told to come in early to unlock the truck for the pre-production meeting. (Tr. 268:4-6; 308:20-25—309:1-4). Hess testified that the meeting was held in the catering tent instead. (Tr. 266: 21-25; 268:6-7).

After the pre-production meeting, which ended at approximately 8:00 or 8:30 AM, Hess went to his workstation in Mobile Unit A and began piecing together the beginning of the show which was scheduled to go live at 11:00 AM with the video available to him at that time. (Tr. 306:16-20; 270:18-22). Shortly after 10 a.m., Hess tried to load video into the X-File 3 that he received from editors on USB sticks into the X-File 3. (Tr. 269:2-4; 14-16). The USB sticks contained video that had to be stored on the EVS network for the show that day. (Tr. 269:3-4).

The video would not load onto the EVS network. (Tr. 269:4). Hess took the USB and plugged it into his personal computer, as he had done in the past when he had experienced problems with the X-File 3. (Tr. 271:20-25—272:1-5). Hess then tried to use a program called Editor to convert the file to a format readable by the EVS network, and then he tried to load the video again into the X-File 3, but it did not work. (Tr. 272:3-5; 410:15-17). Hess sought help from EVS Operator Dean, who primarily dealt with the X-File 3 machine. (Tr. 269:5-7). Dean tried to load the video as well but it did not load. (Tr. 272: 6-12). Hess saw Dean reboot the X-file 3 but the video clips still did not load. (Tr. 272:12-17). Hess walked from the Tape Room into the main production area where Producer Skorich, Executive Producer Adelson and Technology Executive Rokosa were working and told them that the X-File 3 would not load. (269:9-11; 271:14-16). Hess testified that none of them responded verbally to his announcement about the X-File and it did not appear to be a big concern to them. (Tr. 271:11-16; 301:15-17). Hess testified consistently on direct and cross examination that Rokosa walked to the tape room. (Tr. 271:11; 17-19; 301:19). Dean testified that the only question Rokosa asked him was if there was anything Dean could do at that time to fix the X-File. (Tr. 412:3-6). There is no evidence about what took place after that..

Hess and Dean then asked Engineer in Charge West to address the problem. (Tr. 269: 8-9; 270:23-25—271:1-8). Dean testified that West attempted to use a troubleshooting method that had worked in the past. (Tr. 410:25—411:1-2). Instead of trying to convert the file, West took the file and attempted to play the file through a video line. (Tr. 411:2-16). West recorded in his Technical Report dated September 1-5, 2016 that, “X-File 3 was not able to upload or download a MP-4 file we could trans code a MOV file both ways, thinking that we may need to re-install the trans coding software will talk with EVS in Charlotte.” (GC Ex. 25). Hess and Dean told

Creative Director and Supervisor Brian Stoll, who was knowledgeable in this type of problem, what was going on. (Tr. 410:18-21). Hess testified that eventually Stoll managed to convert some files through the old edit system in the master control room, and that two features ²⁵that would not initially load actually aired. (Tr. 272:18-25). Hess testified that there was other video content that did not air because the clips failed to convert and load onto the EVS network. (Tr. 272:18-19). At the end of the live show on Monday, September 5, 2016, no NHRA supervisor spoke to Hess or Dean about clips failing to air or about the X-File 3.

L. Hess and Dean Testified Consistently About the X-File 3 Failing to Load Files Onto the EVS Network

During the hearing Respondent attempted to call into question the testimony of General Counsel's witnesses about the time that the X-File failed to load clips. However, the time is of no consequence. No matter what time the failure occurred, the issue is that certain clips on certain portable media were not converting and thus could not be made available on the EVS network. Nevertheless, Hess testified consistently about the time these problems took place..

On direct examination, Hess testified that shortly after 10 a.m. he discovered that the X-File 3 would not load video, and informed Rokosa, Skorich, and Adelson that the X-File 3 would not load video at that time. (Tr. 269:2-11). Hess was asked at least three different times on cross examination *when* he learned that the X-File failed or did not load video. Hess testified consistently in each of those instances that he discovered that the X-File could not load files just shortly after 10 a.m. (Tr. 301:4-14; 302:4-11; 307:20-25). Respondent did nothing to discredit this testimony.

²⁵ The record is unclear as to how many files experienced issues converting via the X-File. However, ER Ex. 4, the rundown from the Indianapolis race, shows that Executive Producer Adelson's Assistant Barbara Dewey only made notations next to 14 video clips in total. Four clips were marked "No" to indicate that the files did not air. The other 10 are marked "Yes" as if to indicate that the files did make it to air. The remainder of the files have no indication as to "yes" or "no." Presumably, the Respondent checked only those files it knew experienced problems converting at the Indianapolis race.

Hess and Dean both characterized the problem they experienced on Monday, September 5, 2016 with the X-File 3 as both the X-File 3 *malfunctioning*, since its primary function was to convert files, or as there having been a problem with the files themselves. Dean was asked on cross examination which equipment malfunctioned. Dean credibly testified:

Q Okay. And from your perspective, which equipment wasn't working? The EVS machines or the XFile machine?

A: X – Xfile.

Q: And what part of it wasn't working, from your perspective as a technician?

A: It just – it would not convert those – it would not convert those files. I mean that's – that's – that's – that was the usage – that was our purpose for having it. That was one of our main purposes for having the File was to convert files.

(Tr. 424: 11-20).

Dean clearly testified that on Monday, September 5, the X-File in the truck was unable to convert the video files from one format to another. (Tr. 408:22-25—409:1). Dean explained that during the Indianapolis Race, he told Engineer in Charge West that “a file won't format, you know, convert or “we possibly have a problem with the XFile malfunctioning.” (Tr. 410:9-10). When Hess was asked on direct examination what he had done to fix the XFile in the past, Hess testified that that he did not try to fix the XFile but instead tried to “fix the files going into it” by converting the files to different format and as a result the files would load. (Tr. 273:11-18).

M. Respondent Knew There were Technical Issues with the X-File at Indianapolis

The record establishes that Producer Skorich, Executive Producer Adelson and Rokosa each knew of problems with the X-File at some point during the Indianapolis weekend which would warrant an investigation into video content not airing on Monday, September 5, 2016. For example, Hess testified that when Producer Skorich terminated him by telephone on September 14, 2016, Skorich admitted that he knew the X-File had on Monday, September 5, 2016. Hess

testified that he told Skorich that the X-File failing was the reason the video did not air. Hess' testimony is un rebutted. Skorich recorded this in his September 14 email in which he memorialized the conversation with Hess, *see supra*. Skorich admitting having known about the malfunction in that email, writing, "[Hess] said you do know we had major equipment malfunction ***I told him that I was aware of that but. . . .***" (GC Ex. 36). Skorich's response to Hess on September 14, 2016 clearly shows that the Skorich knew on Monday, September 5, 2016 that the X-file malfunctioned.

Furthermore, contrary to his denying that he was aware that the X-File malfunctioned at least earlier in the Indianapolis weekend, the record establishes that Executive Producer Adelson was, in fact, aware that the X-File had malfunctioned. Adelson testified unequivocally in his sworn affidavit, "I was not aware of **any** problems with the X-file 3 during Indianapolis." (Tr. 586: 15-17) (emphasis added). At the hearing Adelson testified that he "***was not communicated with at any time that there was a problem with the equipment.***" (Tr 583:15-24). However, in response to Skorich's September 14th email telling him and other managers that Hess claimed there was "equipment malfunction," Adelson responded by asking specifically if anything new happened "**Beyond what we knew about the Xfiles** [sic] from earlier in the weekend?" (GC Ex. 36). (emphasis added). Technology Executive Rokosa responded to Adelson, "**No just the Xfile.**" (emphasis added) (*Id.*). On cross examination, when confronted with the September 14, 2016 email regarding Hess' termination, Adelson ultimately admitted –contrary to his prior testimony –that he *had known* that there were any problems with the X-File 3 during the Indianapolis race weekend. (Tr 588:7-25—589:1-5; 589:23-25—590:1-2). Similarly, Rokosa's response, "No just the Xfile" shows that Respondent knew that there were problems with the X-File at least earlier in the weekend at Indianapolis.

Moreover, the record evidence establishes that Technology Executive Rokosa knows that the function of the X-File was to convert video files to a readable format before the video could be transmitted onto the EVS network and aired on the show. Rokosa offered a long and detailed explanation at the hearing about the function of the X-File. *See e.g.*, (Tr. 645:21-25—646:1-25; *see also*, 655:8-20). In short, Rokosa admitted that the X-file is the access point for clips to be uploaded via portable media onto the EVS networked machines where operators can then play the clip on air. Therefore, there can be no question that any clip failing to air could have resulted from the machine that is used to transfer the clips and was malfunctioning days before—the X-file. Yet, Rokosa testified that he never asked Hess any questions about the failure of the clips to air, including questions about equipment malfunction. (Tr. 673:14-16).

N. F&F Technical Reports from the Indianapolis Race Show that the X-File Had Technical Issues Throughout the Season, And the Reports Do Not Reflect “Human Error”

Vice President and General Manager of F&F Production Marc Orgera testified that technical reports show technical problems experienced by F&F equipment during the season in 2016 as well as damaged equipment. (Tr. 348:1-6; 356:14-16). Orgera testified that reports can also show human error, for example the technical report covering May 19-22, 2016 indicates human error. (Tr. 351:4-21; GC Ex. 25). In that regard it reads, “Air Day we did go to Bars on air, we believe Katy Did it by accident.” (GC Ex. 25). Orgera unequivocally testified that the entry for Indianapolis does not include any on air user or human error. (Tr. 363:11-14).

Respondent’s Director of Broadcasting Rob Hedrick also testified as to the meaning of the entry for the Indianapolis race weekend. Hedrick testified that the X-File 3 is able to take files from outside the EVS environment and make those files accessible to the EVS machine. Hedrick testified that the F & F report showed that an EVS was not able to “upload or download

an MP4 file.” (Tr. 709:14-24). Hedrick further testified that Respondent required that all files be converted to a MOV file before it is brought back to Respondent’s headquarters. (Tr. 716:19-25-717:1).

With regard to X-File 3 technical difficulties, Orgera testified to the technical report covering February 4-6, 2016. (Tr. 353:5-8; GC Ex. 25). Orgera testified that Engineer in Charge William West recorded that the X-File 3 demo unit failed. (Tr. 353:11-12; 354:9-12; 355:7-10). Orgera further testified that the X-File 3 was newer than the EVS machines on the truck and as a result the engineer had to “dumb down” the X-File 3 to make it compatible with the EVS machines on the truck. (Tr. 357:3-5). Orgera was unsure as to when the demo unit was replaced with the full service unit. (Tr. 369:13-18).

Orgera also testified to the report covering July 21-24, 2016. (Tr. 359:4-6; GC Ex. 25). Orgera testified that the report showed that the temporary license codes were expiring on 7/25/16 which meant that the X-File 3 software would not work without the new codes. (Tr. 359:18-19; 360:14-21). A similar entry was made for the weekend of September 15-18, 2016, showing that temporary codes would be running out on 9/26 again. (Tr. 364:2-10; GC Ex. 25).

1. F&F Technical Reports are Reliable

Orgera testified that technical reports are created by the Engineer in Charge, who has knowledge of the facts contained in the report. (Tr. 349:21-24). Orgera further testified that although West did not always hand the reports in to F&F on time, the reports were created at or near the time the dates of the events indicated in the report. (Tr. 350:3-7). Orgera testified that the longest F&F went without getting reports from West was six or seven days. (Tr. 374:22-25). The record is not clear as to when West returned the technical report dated September 1-5, 2016 for the Indianapolis race. What is undisputed, however, is that Respondent terminated Hess on

September 14, 2016, more than seven (7) days after the end of the Indianapolis race on September 5, 2016.

Orgera testified on cross examination that he never came across a situation where technical reports were falsified with regard to the problems reported or the person responsible for the error reported. (Tr. 371:15-24). Orgera did not testify that West was terminated for falsifying technical reports. Rather, Orgera testified that West was terminated because he was difficult to work with. (Tr. 373:2-8). Orgera testified that West was terminated December 15, 2016. (Tr. 373:2-5).

O. Technology Executive Michael Rokosa Fails to Investigate the Reason for Clip Not Airing

Rokosa's in depth knowledge of the X-File's function coupled with his knowledge that the X-file malfunctioned earlier in the weekend at Indianapolis race as discussed above, makes even more apparent that Rokosa deliberately did not investigate when Rokosa claims to have found the Del Worsham Mello Yello clip on Monday, September 5, 2016 on the EVS network. Rokosa offered hearsay testimony that at the end of the show on Monday, September 5, 2016, Associate Director Katey Stoll, who did not testify, advised Rokosa that the Mello Yello sponsor clip was on the EVS network. (Tr. 648:8-15; 677:21-25; 678:17-20; 679:2-3). According to Rokosa, Stoll found the Del Worsham Mello Yello Car feature, showed him the clip, and the clip played without any problem. (Tr. 648:1-4;16-24). Based on Stoll allegedly finding the clip on the EVS network, Rokosa claims to have immediately concluded that Hess engaged in some form of misconduct.

Rokosa's testimony about finding the clip is equivocal and nonsensical. Rokosa's testimony offers no clear explanation how Stoll knew the clip did not air. When asked by the

Judge if Associate Director Stoll was in the main control room²⁶ Rokosa testified that she was in “one of the trucks.” (Tr. 680:7-9). Yet, Rokosa testified that Associate Director Stoll’s normal position was in the B unit. (Tr. 680:10-11). The record establishes that Rokosa did not care to find out anything about surrounding the reasons for the clip not airing. Rokosa testified that he did not ask Katey Stoll when she found the Del Worsham Mello Yello Car clip. (Tr. 680:15-16). Rokosa testified that Respondent took no steps to determine when the Mello Yello Clip was transmitted into the EVS network. Therefore, based on Rokosa’s conduct, one must conclude that Rokosa did not want to know any details that could point to anything other than having a pretext to blame Hess.

After allegedly finding the Del Worshom clip on the EVS network in a place where it could have aired, the evidence establishes that Rokosa did not ask anyone who is directly involved with airing the video during the show about what happened. Rokosa clearly testified that he did not ask Hess, or Engineer in Charge West to help him find the clip on Monday, September 5, 2016. (Tr. 671:10-12; 16-18). Rokosa did not ask Dean any questions even though Rokosa considered Dean to be a lead in the tape room. (Tr. 672:7-22). Rokosa further testified that he did not ask Dean to help him find the clip on Monday, September 5, 2016. (Tr. 671:13-15). What’s more, Rokosa did not ask Hess, Dean, or Engineer in Charge West what happened with respect to the clip on Monday, September 5, 2016 or at any point thereafter. (Tr. 673:1-13; 673:17-25). Had Rokosa asked Hess, Rokosa might have determined that Hess did not engage in any wrongdoing. The possibility existed that Hess may have directed an EVS Operator to play the clip but the operator failed to perform his/her function. Even though Rokosa never asked Hess a single question about the incident and never allowed Hess the opportunity to present his

²⁶ It appears that Rokosa refers to the main production area in mobile unit A, where management sat in 2016, as the “control room.” *See e.g., supra* fn. 6.

side of the story, Rokosa testified that he nevertheless concluded – without any legitimate basis – that Hess should have owned up to making an error and not “blame the equipment.” (Tr. 656:20-25).

Accordingly, the evidence shows that Respondent knew there were problems with the X-file, and deliberately did not investigate. The only inference that can be drawn for the Respondent’s actions is that it wanted to pass the X-File’s failure off as a problem with Hess’ work performance.

P. The Event Worker Report Associated With Hess Termination Is Completely Unreliable Because The Record Evidence Proves That Respondent Fabricated or Falsely Characterized Piner’s Event Worker Report Keep Piner From Voting in the Union Election

Respondent consistently maintained that Joshua Piner was terminated effective September 19, 2016. In its Representation Case Statement of Position, which set forth its position on challenged ballots, including Piner’s should not be counted, Respondent stated:

Joshua Piner. See **Exhibit 2**, Event Worker Report signed by Marleen Gurrola, Vice President for Human Resources for NHRA indicating that effective September 19, 2016, Mr. Piner was terminated for unacceptable performance and is not subject to rehire. Obviously Mr. Piner was terminated effective well before the petition was filed in this case and is therefore ineligible to vote. (GC Ex. 4)

The Representation Case statement of position attached as Exhibit 2 an Event Worker Report form which sets forth the September 19, 2016 discharge date for Piner. (*Id.*). An Event Worker Report is a form used by Respondent’s human resources department to record personnel actions such as employment separations. (Tr. 140: 9-21). Respondent elaborated in its position statement in the unfair labor practice case dated April 12, 2017 that Piner was terminated due to his terrible performance and behavioral issues. ” (GC Ex. 5 at page 6 of 16 ¶3; *see also* page 7 of 16 ¶1). The Stipulated Election Agreement establishes that eligible voters are “all employees

in the bargaining unit classifications who have been employed by the Employer during two events for a total of 40 or more working hours over the 2016 racing season.” (Pet. Ex. 2). The Stipulated Election Agreement also makes clear that “employees who have quit or been discharged for cause and after the designated period of eligibility” are ineligible to vote. (*Id.*). Piner testified that he worked five events in 2016. (Tr. 434:10-18).

However, the evidence shows that contrary to Respondent’s claim that it terminated Piner in September 2016 and that he was ineligible to vote, the evidence shows that Respondent offered Piner work in November 2016. Also, Rokosa was forthright in testifying that he was impressed with Piner’s experience. (Tr. 658:18-20). The evidence shows that by email dated October 29, 2016, Rokosa eagerly sought Piner’s services for the last race of the season in Pomona, California held on November 10-13, 2016. (GC Ex. 18). The evidence further shows on November 22, 2016 Piner followed up with Rokosa by email to ask about work for the 2017 season. (GC Ex. 29). On that same day, Rokosa responded by email and asked Piner his availability for the 2017 season. (*Id.*) On November 30, 2016 Piner sent Rokosa another email to ask Rokosa for work in 2017. (GC Ex. 30). Rokosa responded to Piner’s email on November 30, 2016 and asked Piner to call him. (*Id.*) Piner testified that on December 1, 2016, he was told by Rokosa that Rokosa had scheduled Piner for 19 events, but that he could not get into the specifics until after the union election. (Tr. 449: 22-25—450:1-15). Rokosa did not deny or refute Piner’s testimony that he could not make specific offers until after the Union election.²⁷

Piner’s name did not appear on the voter list. (*See e.g.*, Pet. Ex. 6). Piner cast a ballot in the election but his ballot was challenged and remained uncounted; Piner’s ballot was among two

²⁷ Rokosa denies offering Piner work for 19 events in the 2017 season. However, Piner produced an email he sent to NHRA partner and his Fox Sports Employer Greg Oldham stating in relevant part, “I’m just checking in with you to see if you’ve hearing anything on NHRA for 2017. When we last talked Mike said he had me for 19 events, but I haven’t heard back from him and am trying to work on my schedule.” (GC Ex. 32).

challenged ballots that were sufficient to affect the results of the election. (GC Ex. 1(s), ORD FUR CONSOL, PRTL DEC ON OBJ,²⁸ ¶2 page 2 of 5; *see also*, Pet Ex. 11 Revised Tally of Ballots).

Respondent never told Piner that he was fired. Instead, Piner testified that in January or February 2017 he learned from the Union that he had been fired. (Tr. 454:21-25—455:1-5, 7-10).

Accordingly the evidence establishes that Respondent sought to keep Piner’s vote from being counted in the Union election. The record is devoid of testimony explaining the inconsistencies between the Event Worker Report form submitted in connection with the Representation case on December 9, 2016 for Joshua Piner showing that he was terminated in September 2016 for poor and unacceptable performance, and Rokosa seeking to hire Piner to work the last race of the season in November 2016 or Rokosa asking Piner for his availability in the 2017 season. Furthermore, there is no explanation for a second Event Worker Form produced in connection with the unfair labor practice case which indicates that Piner was not terminated at all. *See discussion infra*.

1. Gurrola’s Testimony About Piner’s Event Worker Reports Shows that the Event Worker Report Associated with Hess Is Unreliable

On May 11, 2017, in the unfair labor practice case,– six months after the mail ballot election – Respondent produced a second, and different Piner Event Worker Report form reflecting his discharge. The second Event Worker Report also states 9-19-16” as the effective date of Piner’s termination, and is also purportedly signed by Gurrola on 9/20/16. Contrary to the first form, the second form states that Piner was “eligible for rehire” and the cause for

²⁸ The Order Further Consolidating Cases, Partial Decision on Objections, Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections dated September 8, 2017 indicates that the petition was filed on October 20, 2016.

separation box indicates “No other wkd[sic] scheduled.” (Tr. 143:6-7; GC Ex. 12). Vice President of Human Resources Gurrola testified that she dated and signed the second Event Worker associated with Piner. (Tr. 143:1-5; 17-20; GC Ex. 12).

Gurrola candidly testified that in some cases when a supervisor no longer wanted to hire a production crew²⁹ employee she back-dated forms. (Tr. 144:16-19). Gurrola could not recall what she did in Piner’s case. (Tr. 144: 20-22). The record contains no explanation as to the discrepancies between the two forms that have the same exact dates but different reasons for separation.

2. The Inconsistency Between the Date On Hess’ Event Worker Report and the Timing of Hess Termination Calls Into Question the Reliability of its Contents

The Event Worker Report forms associated with Joshua Piner’s employment suggests that Respondent creates evidence to suit its interests. The record shows that an Event Worker Report associated with Nathan Hess’ termination was also submitted in connection with the December 9, 2016 statement of position in the representation case.

Gurrola testified that she signed Hess’ Event Worker Report form which was produced in connection with the Representation Case. (Tr. 141: 1-10).³⁰ Gurrola testified that she dated the form, made all the markings on the form, and completed the cause for separation box. (Tr. 141:11-19). The Event Worker Report that Respondent attached as Exhibit 1 to its Representation Case Position Statement indicates that Hess’ termination was effective September 7, 2016, and was signed by Vice President of Human Resources Gurrola on September 8, 2016. (GC Ex. 4; *See* Representation Case Position Statement page 5).

²⁹ Vice President of Human Resources Gurrola testified that she uses the term production crew and event workers interchangeably. (Tr. 146: 4-5).

³⁰ Hess’ name did not appear on the voter list. (*See e.g.*, Pet. Ex. 6; see also Tr. 281:9-16). Hess received a ballot in the Union election by calling to request one at the NLRB office. (Tr. 291:17-19). Hess voted in the Union election. (Tr. 276:19-20). Hess’ ballot was challenged, and remained uncounted; Hess’ ballot was among 2 challenged ballots that were sufficient to affect the results of the election. (GC Ex. 1(s), ORD FUR CONSOL, PRTL DEC ON OBJ,³⁰ ¶2 page 2 of 5; *see also*, Pet Ex. 11 Revised Tally of Ballots).

However, contrary to Respondent's own Event Worker Report Form, the record establishes that the decision to terminate Hess was made on September 14, 2016. Rokosa testified that no decision was made at the end of Respondent's initial call regarding Hess' employment between him, Producer Skorich, and Executive Producer Adelson following the Indianapolis race. Executive Producer Adelson testified that the initial discussion regarding Hess' performance during the live show on Monday, September 5, 2016 between him, Producer Skorich, and Technology Executive Rokosa took place on either Wednesday or Thursday following the race – September 7th or 8th. (Tr. 554:15-19). Rokosa likewise testified that he talked with Executive Producer Adelson, and Producer Skorich on either Wednesday or Thursday later in the week. (Tr. 652:6-7; 20-25—653:1-2). Wednesday or Thursday after the Monday, September 5, 2016 race would have been September 7 or September 8 respectively. Rokosa conclusively testified that no decision was made concerning Hess' employment at the end of their initial call which would have been either September 7th or 8th. (Tr. 653:10-12). Yet, the date on the form does not coincide with Hess' actual termination date.

Gurrola's testimony that she back dated forms, the evidence that both Hess and Piner's forms were produced in connection with the representation case, and the inconsistency of the dates for Hess' form suggest that like Piner's form, Hess' form was created to suit Respondent's anti-union interest. Therefore, the reason asserted for Hess' termination should not be relied upon.

Q. The Evidence Establishes that Respondent Exhibited Strong Anti-Union Animus

1. After Learning of Union Activity on September 3, 2016 Respondent Planned its Response to Discourage The Crew From Engaging in Union Activity Before its Next Race on Beginning on September 16, 2016.

In the two week period between the Indianapolis Race which ended on September 5, 2016 and the next race scheduled to start September 16, 2016 in Charlotte, North Carolina,³¹ after Respondent learned of Union activity at the Indianapolis Race on September 2, 2016, it held two to four internal meetings with its general counsel, outside counsel, and members of management in response to the Union organizing. (Tr. 118:2-8; 492:1-8). Vice President of Human Resources Gurrola testified that during that period of time she was trained on what constituted threats, unlawful promises, and surveillance. (Tr. 492:8-14).

2. After Learning of Union Activity on September 2, 2016 Supervisor Peter Skorich Told Editor Raposo that Respondent Would Nip the Employees' Union Organizing in the Bud

Raposo worked for Respondent as an editor for about five years from 2013 until August 2017. (Tr. 317:1-5). Raposo was normally stationed at Respondent's Headquarters in Glendora, California. (Tr. 317:10-12). Raposo worked 14 out of the 24 Mello Yello races on site in 2016. (Tr. 318:1-4). Producer Skorich was one of Raposo's supervisors. (Tr. 319:21-24). When he was working on site at a race, Raposo normally performed his work in the lunch tent on the TV compound within walking distance from the production trucks. (Tr. 319:6-16). Raposo testified that he only interacted with two "truck guys" stationed in production truck A—Eddie Dean and Nate Hess. (Tr. 320: 7-12; 321:12-14. Raposo interacted with only Hess and Dean by virtue of their respective positions in the tape room. As the tape producer, Hess was the head of the tape room. (Tr. 650:13-19). Dean was considered a lead in the tape room. (Tr. 672:20-22).

Sometime during the two week period after the Indianapolis race which ended on September 5, 2016, Editor Raposo was working in the editing suite at Respondent's headquarters in Glendora, California, and had a conversation concerning the Union with Producer Peter

³¹ The dates of the Charlotte, North Carolina race in 2016 were September 16-18. GC Ex 18.

Skorich. (Tr. 326:16-25). Raposo was editing the Lucas Oil Show³² when he realized that the video he was editing was shorter than the necessary 44 minutes. (Tr. 327:5-13;329:4-8;334:4-10). Raposo told Producer Skorich that the video was short, and he wanted to know what to do. (Tr. 327: 18-19; 23-25). Skorich responded stating that the burnouts³³ were missing which would explain why the video was short by two minutes.³⁴ (Tr. 328:1-6). Raposo then said, “You know, these Union guys, they want more money; but they can’t do their job right.” (Tr. 328:7-12; 334:12-14). Raposo testified consistently on direct and cross examination that **Skorich responded, “Oh, don’t you worry about that. That’s going to get taken care of. That’s going to get nipped in the bud.”** (Tr. 328:10-15; 334:15-18). Respondent failed to call Skorich, an admitted supervisor, to testify at the hearing.

3. Within Days of Hess’ Termination, Vice President of Human Resources Created An Impression that the Production Crew’s Union Activity Was Under Surveillance, Threatened Employees And Solicited Grievances

The evidence shows that Respondent’s Human Resources Representative did not attend consistently attend races until Respondent learned of Union activity at the Indianapolis race on September 2, 2016. Vice President of Human Resources Gurrola attended the first race of the season in February 2016 which was held in Pomona, California, just 15-20 minutes away from Gurrola’s office in Glendora, California. (Tr. 139-24-25—140:1-8; 486:1-8). Gurrola testified she did not attend any of the seventeen races after the Pomona race until the Charlotte, North Carolina race on September 16-18, 2016 (Tr. 508:14-21). The record is clear that Gurrola attended the race immediately after Respondent learned of Union activity at the Indianapolis race and as a result of the internal meetings that took place between the Indianapolis race and the

³² The dates of the Lucas Oil Show held in Brainerd, Minnesota in 2016 were August 18-21. GC Ex 18.

³³ Burnouts are video of race cars spinning their back tires in order to clean debris providing for better traction while racing. (Tr. 328:18-25—329:1-3).

³⁴ The Employer never raised the Lucas Oil show being short by two minutes as a reason for Hess’ termination.

Charlotte, North Carolina race. Gurrola addressed the production crew within two to four days after Hess was terminated, and within about two weeks since Hess distributed link to the Union authorization card on September 3, 2016. Gurrola in no way acted consistent with sparse attendance prior to the Union activity. Respondent admitted in its position statement that Gurrola attended the last six consecutive races of the season. *See* GC Ex. 5 ¶4 at page 4 of 16.

Gurrola testified during the weekend of September 16-18, 2016, she met with the production crew at the Charlotte, North Carolina race to talk to them about the Union. (Tr. 493:25—494:1-2). Piner testified that Producer Skorich made an announcement on the headset to inform the crew about the meeting, and that he attended the meeting where Gurrola addressed the production crew. (Tr. 441:10-13 Tr. 441: 5-13). Gurrola testified that about 40-45 members of the production crew were present at the meeting. (Tr. 497: 2-4). Present at the meeting on behalf of Respondent were Executive Producer Adelson, Producer Skorich, Director Sobczak, CEO Peter Clifford, Technology Executive Rokosa, and Vice President of Human Resources Gurrola. (Tr. 401:16-23; 402:1-7; 442:11-16). EVS Operator Dean was present for the meeting and recorded Gurrola's speech. (Tr. 401: 2-6;21-25). Dean recorded Gurrola stating the following regarding Respondent's anti-Union views during the meeting:

But I also wanted to talk about another really important thing that has come up and that is the union ... 'cause I know that some of you have been approached and talked to about perhaps going in the union ...

Um, we don't feel that it is, it is a productive thing to-uh-a relationship to get into. For starters, uh, and there are consequences, okay?

And, we don't want you to sign the card. We don't feel there's a need to do that. Once you entered into—once there's a union, there's now a third party in our relationship. If I [background noise] right now, if you have issues or anything you wanted to discuss, [pause-background noise] you can come to me. Bring them to our attention and we'll, you know, we'll look into it.

.I mean, give us an opportunity to fix issues. The...uh... so uh, you know, we have good practices, good policies in place to help the employees, that's what my job is... I'm a hundred percent for you guys out there. To make this a good working relationship between the two of us. When you bring the union in, that model goes out the door. Just so you know.

(GC Ex. 26A; 26B (Transcript))

Gurrola reviewed a transcription of the audio recording captured by Dean, and admitted that the recording accurately captured what she said at the meeting. (Tr. 496:15-20). Gurrola admitted that the NHRA did not want a Union represented workforce. (Tr. 118:9-18; 494:5-7). Gurrola further admitted that she went to the Charlotte, North Carolina Race to warn employees about the Union activity. (Tr. 493:11-16).

Piner testified that after the meeting, Gurrola entered his workstation in Mobile Unit B to introduce herself and ask what certain machines did. (Tr. 443: 15-22). Gurrola remained in Piner's work area for about five minutes. (Tr. 443: 23-24). Piner testified that prior to the second race in Charlotte, North Carolina,³⁵ he had never met Gurrola. (Tr. 443:25—444:1-2). Likewise, Dean testified that prior to the meeting in Charlotte, he had not met Gurrola. (Tr. 402:8-10).

4. Respondent Refuses to Meet And Discuss Hess Termination With Union Representative John Culleeny at the Charlotte Race on September 16, 2016

Culleeny testified that he learned prior to the Charlotte race, Respondent was terminating crew members, laying people off, and cutting employee hours. (Tr. 176:12-18). Culleeny was shocked that Hess had been terminated and became concerned that Respondent was retaliating against employees' Union activities. (Tr. 176:18-20). Culleeny and the head of North Carolina's Studio Film Mechanic's local union Jason Rosine went to the Charlotte racetrack where the event was taking place. (Tr. 176:21-25—177:1-3). Culleeny and Rosine walked into the TV compound and asked to speak with Executive Producer Adelson. (Tr. 177:5-6). Culleeny introduced himself and Rosine to Adelson, and identified themselves as being with the

³⁵ The dates of the first race in Charlotte, North Carolina race in 2016 were April 22-24, the dates of the . GC Ex 18.

Union. (Tr. 177:8-9). Culleeny asked Adelson, “Did you know that you have an organizing drive going on?” (Tr. 177:9-10). Adelson responded, “I guess so.” (Tr. 177:11). Culleeny said, “Well, you guess or you know so? What have you heard about it?” (Tr. 177:12-13). Adelson told Culleeny that he knew about the organizing drive for a couple of days. (Tr. 177:14). Culleeny asked Adelson to have a talk with him, and suggested that Adelson bring whomever he wanted. (Tr. 177:15-16). Adelson asked Culleeny and Rosine to stand about twenty feet away and wait. (Tr. 177:17-18). Culleeny and Rosine stood by a fence for about five minutes. (Tr. 177:22-25—178:1). Then, Adelson, Rokosa, and Gurrola approached Culleeny and Rosine at the fence. (Tr. 178:8). Gurrola said, “You have to go.” (Tr. 178:8-9). Culleeny told Gurrola that he was concerned that Respondent was firing people illegally and that the Union was going to file an unfair labor practice charge against the NHRA. (Tr. 178:10-12). Gurrola responded, “Well, you just have to go. You’re being threatening.” (Tr. 178:13-15). Rokosa asked Culleeny to leave. (Tr. 178:24-25). Culleeny and Rosine agreed to leave and left. (Tr. 179:1).

5. The Respondent Campaigns Vigorously against the Union at the Charlotte Race Beginning on September 16, 2016 and For the Remaining Five Races of the Season

Vice President of Human Resources Gurrola testified that when she attended these last six races of the season, she spoke to the production crew about the Union organizing drive. (Tr. 119:11-19). Gurrola testified that she had discussions with the production crew in small groups, discussing work related issues and complaints and discussing Union affiliation. Gurrola took notes when she met with employees in small groups, none of which Gurrola did prior to Respondent learning of Union organizing on September 2, 2016. (Tr. 129:1-4).

Gurrola’s special interest in the truck guys shows that Gurrola understood that the truck guy were behind the Union organizing drive. Gurrola’s notes reveal that she mainly spoke with

truck guys about their ongoing complaints related to meals, and that she took notes about the Union. (*See generally* GC Ex. 7). Gurrola’s notes memorializing employees’ complaints state, in part, “Bring snacks/WTR into truck especially on Sunday; Catered meals were delivered prior in ESPN to them; Boxed lunch” (Page 3 of 26); “No relieve to use restroom for those in trucks” (Page 4 of 26); “Talk to: Truck 2 [employee names listed]” (Page 6 of 26); “Truck #A; “CBS Union * Tom McJennett (Page 8 of 26); “Truck B [employee names listed]” (Page 10 of 26); “used to get missed meal penalty: (Page 12 of 26); “William West-Chief Engineer” (Page 13 of 26); “B4 Bkfst B4 on clock; Hotels: fruit loops and milk; He pay into union-doesn’t use benefit.” (Page 14 of 26); “Talk about Union” (Page 19 of 26); “No Union [employee names listed]” (Page 22 of 26); “At least 2 meals catered on Sat +Sun (at least)” (Page 24 of 26); “message to ee’s on Union” (Page 25 of 26). (*Id.*). As noted in her entry on Page 8 of 26, “Truck #A; “CBS Union Tom McJennett” Gurrola testified that in the course of her conversation with A1 Broadcast Technician Tom McJennett, he revealed that he did not support the Union. Gurrola clearly believed McJennett’s union sentiments to be important, as she documented it in her notes. (Tr. 500:8-15). Gurrola identified McJennett as appearing in video asking employees to “Vote No” in the Union election. (Tr. 162:16-17; Pet. Ex. 5).

The evidence shows that Gurrola was resentful of the employees’ collective complaints. In that regard, when testifying about page 14 of 26 which states in part, “Fruit loops and milk”, Gurrola testified that while she could not recall who raised a particular complaint that Fruit loops and milk was an inadequate breakfast, Gurrola believed that the complaints “... would have come from people that were from the old ESPN group. They seemed to feel that they knew, you know, they knew better than our new operation as to how it should be produced.” (Tr. 500:25—501:1-13).

The evidence shows that Respondent kept track of employees' union sentiments. Regarding page 22 of 26 Gurrola testified that the list of employee names under "No Union" were employees who she talked to after she gave Respondent's position on the Union, and the employees either told her that they weren't for the Union or didn't want the Union. (Tr. 505:21-25—506:1-6).

The evidence further shows that although Gurrola knew of employee complaints as early as February or March, it was not until after the Union organizing campaign that Gurrola began soliciting complaints, and fixing them. Dean testified that he was part of a small group meeting with Gurrola at either the Charlotte race or the race after Charlotte. (Tr. 407: 5-11). Dean testified that Camera Operators Chris Peacock and Steven Hines, and Technical Director Gordon McBride were in his group. (Tr. 405:19-25—406: 1-6). Dean testified that Gurrola solicited their complaints, asking what she could do to make things better. (Tr. 406: 7-10). Dean testified that the group raised several issues including the NHRA's practice of deducting per diem when a meal was provided at a hotel being below industry standard, problems created by the car sharing system when employee end times varied, terrible conditions related to food, and the number of hours they worked. (Tr. 406:11-25—407:1-4).

Dean testified that Respondent made changes to the per diem policy after Gurrola addressed the production crew at the Charlotte, North Carolina race. (Tr. 407:14-17; 408:4-6). Respondent did not rebut Dean's claim. Dean testified that at the St. Louis Race³⁶ the crew was given the option, on an individual basis, to decide whether to keep the per diem as is, or choose a flat per diem rate that would not be deducted even if breakfast was provided at the crew hotel. (Tr. 407:14-25). Dean further testified that the crew filled out a form with their choice and

³⁶ The dates of the St. Louis, MO race in 2016 were September 23-25. GC Ex 18.

returned it to Respondent. (Tr. 408:1-3). There can be no doubt that Respondent changed the per diem policy to discourage employees from joining the Union.

6. Respondent Continues its Attempts to Discourage Union Organizing After the Union Filed its Representation Petition on October 20, 2016

The Union filed a representation petition on October 20, 2016. Within days of the filing of the petition, on October 25, 2016, Gurrola sent the production crew an email informing the crew that, *[a]s you know*, the stagehands' union has been *trying desperately to get you to become their paying customers.*" "[T]he union filed a petition asking for a secret ballot election among a *small group* of NHRA TV production employees." (emphasis added). Gurrola further stated, [t]he purpose of the election would be for *this small group* to decide whether or not all of you should be represented by the stagehands' union" and "the union is trying to reduce the number of participants in the election to a *small handpicked group*" "as you know, our position is that a union is not necessary. Our preference is to deal with each of you directly and individually, without you losing your right to make decisions about your job" (GC Ex. 8).

The Las Vegas, Nevada race (October 27-October 30) was the first race following the filing of the petition. (GC Ex. 18; *See also* Tr. 181:19-24; GC Ex 1(s), ORD FUR CONSOL, PRTL DEC ON OBJ,³⁷ ¶1 page 1 of 5). Respondent made sure to address the crew about the Union again and its great successes without the Union during the 2016 season. Dean testified that NHRA management held a meeting in the catering tent with the production crew at the Las Vegas race. (Tr. 413:13-18; 414:14-15). Executive Producer Adelson and NHRA CEO Peter Clifford both spoke at the meeting. (Tr. 413:16-20). Dean testified that Adelson said that it was

³⁷ The Order Further Consolidating Cases, Partial Decision on Objections, Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections dated September 8, 2017 indicates that the petition was filed on October 20, 2016.

because of the crew and its experience that the NHRA was one of the great success stories in sports, but warned that if the employees chose to be represented by a Union, they would no longer be able to work together in the same way. (Tr. 413:21-25—414:1-10). Dean made an audio recording of the meeting and (Tr. 414:17-20) recorded Adelson stated “I want to be able to talk to you directly and we need that chance now to take what we have done and bring it to the next level.” Adelson cautioned employees that the opportunity to replicate the successful season would be lost they had if they bring in a union. (GC Ex. 27A; 27B (Transcript)).

Respondent sent emails within days apart before the ballots for the election would be mailed on November 15, 2016 to caution the crew about the effects of Unionizing. By emails dated November 7, 2016, November 10, 2016, and November 15, 2016 Gurrola repeatedly informed employees that Union representation was not in employees’ best interest or the interest of the sport of drag racing. (*See e.g.*, GC Ex. 9, 10, 11). On November 7, 2016, Gurrola sent the crew an email telling them to vote “No” in order to keep a direct relationship with the NHRA and avoid the prospect of getting less money or wages. (GC. Ex. 9). Gurrola’s November 10, 2016 email stated, “Ratings are up, teams and sponsors love your work, and we anticipate that next year will be even better. As a team, working as one, we will maintain this momentum together for the drivers, the crews, the fans, and in doing so fully realize the extraordinary potential of the NHRA.” (*Id.*). Finally, on November 15, 2016, Gurrola sent the production crew another email stating that the NLRB would be mailing employees a ballot in order to vote on whether to continue a direct relationship with Respondent. (GC Ex. 11). The email contained a link to Respondent’s campaign – www.NHRAVOTE.com – where video messages were posted. (*Id.*). One of the videos included messages from drag racers and members of the production crew sharing how great their experiences were from the 2016 season. (Pet. Ex. 5).

Gurrola identified employees Thomas McJennett, Todd Veney, and Paul Kent in the video. (Tr. 162:16-21). The video contained a message at the end from Gurrola and Executive Producer Adelson asking the production crew to vote “No” on the Union so that Respondent and its employees could continue to work together. (Pet. Ex. 5). The message was clear to the crew, if the Union was voted in the quality of their work would be affected negatively.

7. Technology Executive Rokosa Tells Employees On November 15, 2016, the day that Ballots are Mailed Out, That Union Representation Would Delay Respondent Making Job Offers for the 2017 Season

On November 15, 2016, the NLRB mailed ballots to the production crew by United States mail. (Pet. Ex. ¶1). On that same date, Technology Executive Rokosa sent the crew an email requesting their availability for the 2017 season. (GC Ex. 6). In the guise of soliciting work availability for the 2017 season, Rokosa threatened employees that voting in the Union meant a delay in Respondent making job offers. Rokosa’s email states in relevant part:

Because we are in the midst of a union election, our hands are tied as far as making offers for 2017. Once the votes are counted on December 2, if NHRA wins the election, we will be able to let you know promptly when we can schedule you to work during 2017, based on your availability and our needs. We will also be able to confirm new terms for 2017. If the union wins the election, we will be obligated to bargain certain terms for 2017 season and we do not know how long that might take. (GC Ex. 6)

The record evidence establishes that Rokosa’s statements in the November 15, 2016 email are completely false. Executive Producer Adelson testified that Respondent made offers to a small group of employees before voting began on November 15, 2016 including to the technical director, the associate director, a graphics operator, and two camera operators. (Tr. 110:19-25—111:1-4; 112:4-8). Therefore, the Union election in no way affected Respondent’s ability to make job offers.

III. RESPONDENT'S DEFENSE

Producer Skorich did not tell Hess that Respondent was terminating him because four clips failed to air during the live broadcast on Monday, September 5, 2016 – as Respondent later claimed in its position statement dated April 12, 2017. *See* GC Ex. 5 ¶2 at page 6 of 16. Respondent has consistently claimed that one of the clips that failed to air was a feature that was very important to its sponsor was during the live broadcast on Monday, September 5, 2016. Adelson testified that Respondent's primary sponsor Mello Yello "created this particular car with this driver just to run in this race." (Tr. 552: 1-4). Rokosa testified that the Del Worshom Mello Yello clip was undoubtedly on the EVS network at the end of the live broadcast on Monday, September 5, 2016. Yet, Respondent Witness and Director of Broadcasting Rob Hedrick testified that the Mello Yello Clip was not on the EVS network. Therefore, in addition to Rokosa's story that he found the clip on the EVS network at the end of the race day being completely contradicted, Hedrick's testimony calls into question the credibility of Executive Producer Adelson's testimony as well. Adelson and Rokosa's testimonies center on the Del Worshom Mello Yello Clip being a deciding factor in Hess' termination. Adelson testified that CEO Peter Clifford had discussions with the sponsor about the Mello Yello Clip, and the sponsor was "very upset." Rokosa testified that he told Skorich and Adelson that the Mello Yello Clip was on the network and that its failure had nothing to do with equipment malfunction. In other words, aside from any equipment problems, Hess was completely responsible for the Mello Yello Clip failing to air because the clip was accessible on the network.

This huge discrepancy is a hindrance to Respondent meeting its burden of persuasion by the preponderance of the evidence; its defenses are riddled with inconsistencies and Respondent piled on of defenses.

A. The Respondent Piled On Defenses In an Attempt to Legitimize Hess Termination

1. In its Position Statement Dated April 12, 2017, Respondent Claimed That Hess Was Disruptive, Argumentative and Uncooperative Throughout the Season

The record further establishes that th Respondent piled behavioral issues onto Hess' alleged performance issues as a reason for his termination. Skorich did not tell Hess at the time of his termination or nor did Respondent at any time during the season tell Hess that he was uncooperative or disruptive as claimed by Respondent in its position statement dated April 12, 2017. In that regard Respondent claimed,

A number of times Mr. Hess came out of his work area, which was adjacent to the main production area, ran out of his seat and into the main production area, and yelled loudly and argumentatively when he did not agree with something that was happening, e.g., a creative call made by the Show Producer. Mr. Hess engaged in such disruptive behavior multiple times throughout the year and there were many witnesses to that behavior. *See* GC Ex. 5 ¶1 at page 6 of 16.

Respondent further claimed in its position statement that, “Mr. Hess’s performance and behavior was incompatible with the professionalism demanded by the job and the telecasting network. NHRA could no longer risk jeopardizing its television productions by inviting Mr. Hess back.” *See* GC Ex. 5 ¶2 at page 6 of 16. Hess unequivocally denied ever being disciplined in anyway. (Tr. 276:8-10). Hess further testified that Respondent did not speak to him about his behavior toward Skorich at all. (Tr. 276:2-7). The record establishes that Respondent did not reprimand or discipline Hess at the time of the Indianapolis race for any reason. The inconsistencies in Respondent’s claims show that the reason Respondent eventually relied upon at the hearing was not the real reason for Hess termination.

2. Respondent’s Claim that Hess Was Dishonest at the Preproduction Meeting at Indianapolis is Unsubstantiated.

Respondent cited dishonesty as another fault against Hess in an attempt to substantiate Hess' termination. Respondent claimed in its position statement dated April 12, 2017 that Hess lied about having certain video content at the production meeting on Monday, September 5, 2016. Respondent stated that Hess affirmed having the clips during the preproduction meeting on Monday, September 5 but that when Hess was asked for the clips during the show he failed to produce them. *See* GC Ex. 5 ¶1 at page 6 of 16. Yet, Producer Skorich by virtue of his role was Hess' direct line of communication during the show and was the person in charge of the pre-production meeting. Producer Skorich did not testify. There is no dispute that Skorich is in charge of leading the pre-production meeting. Adelson testified that the producer goes through the run down line by line at the preproduction meeting. (Tr. 541:10-13). Thus without Skorich's testimony, Respondent cannot establish that Hess failed at any point to give Respondent advance notice of any issues Hess had with clips.

Respondent's attempts to provide vague and general testimony via Rokosa that Respondent got "no advance notice" of clips that did not air cannot be credited. (Tr. 684:20-25). First, Rokosa was neither Hess' direct line of communication during the show nor was Rokosa present in Mobile Unit A during the live broadcast except for when the Mello Yello clip allegedly failed to air. Yet without knowledge of the facts, Rokosa testified that there was not any advance notice for all four clips. Rokosa testified, "But at no point was production pre-warned that these four elements were not available and we were trying to work through it, which would've at least allowed them the opportunity to have a plan B." (Tr. 684:15-18).

Moreover, neither Adelson nor Rokosa testified to any specifics about what Hess did or did not do during the preproduction meeting, despite testifying about what typically happens during those meetings. (Tr. 539:5-25-542:1-4). Adelson never testified to being present at the

preproduction meeting on Monday, September 5, 2016. (See e.g, Tr. 641:9-643:1). Rokosa did not testify that he was present at the preproduction meeting on Monday, September 5, 2016 either. Therefore, Respondent cannot substantiate its claim in its position statement, or at the hearing that Hess provided no advance notice to Producer Skorich about the status of the clips that did not air.

3. Respondent's Claim That The Mello Yello Clip Was On The Server Is Entirely Contradicted By Director of Broadcasting Hedrick's Testimony

Technology Executive Rokosa testified that the Del Worshom Mello Yello Clip was on the server at the end of the live broadcast on Monday, September 5, 2016. (Tr. 648:18-24). Respondent claims that Hess simply failed to ensure that the Del Worshom Mello Yello clip played on air at the appropriate time. Respondent suggests that the mere fact that the Mello Yello Clip was on the EVS network at the end of the broadcast on Monday, September 5, 2016, in and of itself means that Hess did not do his job in getting the clip to air. Furthermore, Respondent claims that the Del Worshom Mello Yello Car was especially significant to its sponsor and CEO Peter Clifford. However, Respondent introduced through its Director of Broadcasting Robert Hedrick, a document that purports to show all the video files that were transmitted, and ready for air, from the X-File onto Respondent's EVS Network on Monday, September 5, 2016. (Tr. 703:15-17;710:12-14). Hedrick testified that the document was a screenshot of a folder showing the clips, also known as "melts"³⁸ that were transmitted to the EVS network on September 5, 2016 between 8:22 a.m. and 1:05 p.m. (Tr. 699:19-25—700:1; ER Ex. 9). Hedrick testified that files "would have had to be in the [EVS] machine to be able to end up in this document" and "this is telling me what clips were in the machine ready to be run." (Tr. 701:17-18; 703:15-17).

³⁸ A melt is a highlight reel of all the best video of the day. (Tr. 700:6-7).

Contrary to Rokosa's testimony, Director of Broadcasting Hedrick testified that from his review of the folder the Mello Yello car clip was *not on the EVS network*.

Regarding the Del Worsham Mello Yello Car clip Hedrick testified:

JUDGE GREEN: Okay. Do you know whether any of these clips are the Mello Yello car clip?

THE WITNESS: From my look over the folder, they are not.

JUDGE GREEN: Okay. You know what the Mello Yello car clip is?

THE WITNESS: Yeah. There was a sponsorship element.

(Tr. 717:12-15)

Respondent counsel implied that Nathan Hess may not have sent or may have deleted the Del Worsham Mello Yello Car clip from the features folder.

Q BY MR. MURPHY: As a follow-up to the Judge's question about the Mello Yello clip, who is it that arranges for the melts to come back to Glendora? Who's responsibility is that?

A: Ultimately, I work with Ken or Mike Rokosa to make sure that there's someone scheduled—whoever's going to be the earliest back to the office. And then once the tape producer makes the melt, they know to hand it off to that person and then bring it back to Glendora.

Q: So the tape producer is the one who will decide which clips to send back to the X-file?

A: Correct.

Q: And then back to Glendora?

A: Correct.

Q: So the tape producer has the ability to delete, not send, or send?

A: Correct.

(Tr. 717:20-15—718:1-10)

Yet, in Respondent's position statement dated April 12, 2016, Respondent explicitly stated that EVS Operator Dean was in charge of making melts during the 2016 Season. (*See GC Ex. 5 ¶9* at page 13 of 16, "Dean did "melts" of video clips at the end of each weekend."). On re-cross examination, Director of Broadcasting Hedrick had no knowledge of fact that Dean was in charge of creating melts.

a. Screenshot of EVS Network Folder (ER Ex. 9) is Unreliable

Director of Broadcasting Operators Hedrick testified that he works full-time for Respondent outside of the regular 24 race season. (Tr. 712: 14-25). Hedrick testified that he created ER Ex. 9 on his own volition in response to a question posed to him by Executive Producer Adelson. (Tr. 713: 6-10). In this regard Hedrick testified:

Q BY MS. COX: Okay. So you testified that you created this last week, right? Who asked you to create this document, R-9?

A: Nobody asked me. Ken Adelson had asked me a questions saying the judge had asked about a time stamp. And so I created it finding this.

Q: So you created this because Ken Adelson asked you?

A: I was asked to find if there was any way to find the time stamp on a file.
(Tr. 713:6-13)

Hedrick testified a second time that Adelson asked if there was any way to know when **a file** was created. (Tr. 713:17-18) (emphasis added). Hedrick repeatedly testified, “Well, Ken did not specifically ask for this. He just asked for **a time stamp**” (Tr. 716: 2-4; *See also* 719:3-4 “if there’s a way to know **a time stamp.**”) (emphasis added). Notwithstanding being asked about *a single file*, Hedrick did not use search terms to create ER Ex. 9. (Tr. 713:19-21). Instead, Hedrick testified:

JUDGE GREEN: Can you run it by me on how it was created?

THE WITNESSES: So I have – we have a centralized server in our office where when the melt comes back from the remote broadcast, one of our tape operator - - or one of our editors copies everything into the server. We have a folder structure set up to make sense for everybody to get the right files. And then this was in that folder. **I went into that file and looked for** – because I am always going and pulling back clips, because I added all of our high end features. And I was looking through the directory structure and saw the clips labeled in there. So I screenshotted it.

(Tr. 704:20-25—705:1-5) (emphasis added).

Remarkably, on Monday, March 5, 2018, during Technology Executive Rokosa’s testimony, Judge Green asked Rokosa if there was any way to determine when the Del Worsham Mello Yello Clip that Rokosa allegedly found was loaded into the EVS network. (Tr. 681: 6-13).

Rokosa responded that he assumed there was a time-date stamp on the clip but was unsure. (*Id.*). Consistent with the timing of Judge Green's question to Rokosa about when the Mello Yello Clip may have been transferred, Hedrick testified that he created ER Ex. 9 on Tuesday, March 6, Wednesday, March 7, or Thursday, March 8. (Tr. 704:15-19; 706:25—707: 1-7; 708: 6-13). Despite the close proximity of Judge Green's question to Rokosa and Adelson's request for certain information from Hedrick, Hedrick denied having discussed testimony with Adelson or anyone else from NHRA. (Tr. 719:5-6,15-18).

Hedrick testified outright that he has full rewrite access, meaning that he can modify, delete, or add files to the folder purported to show files transmitted to the EVS Network on Monday, September 5. (Tr. 707:8-13). Hedrick's testimony offers an explanation as to flaws contained in ER Ex. 9, the first flaw being that although ER Ex. 9 purports to show files transmitted on September 5, 2016, the first page shows two files as being transmitted on September 6, 2016 at 1:06 PM and 1:09 PM. (ER Ex. 9). Next, the files listed on the fourth page of ER Ex. 9 are in chronological order whereas the third page contains 6 files starting at 10:22 AM and ending at 10:42 AM that belong sequentially inserted between various files listed out of order on page 1 of ER Ex 9. A closer look at the various files listed on page 1 of ER Ex. 9 reveals the folder was sorted alphabetically, starting with AJohnsnInter – 011-31-AUG-2016-Jib.mov and ending with ZizzoInter – 019-31-AUG-2016-Jib.mov, unlike the rest of the files listed in the document which do not appear alphabetically, and instead appear sorted chronologically. Therefore, the document does not represent just a picture of the folder; rather the document suggests that before a picture was taken the folder was sorted, and the September 6, 2016 were added.

- b. ER Ex 9 Supports a Finding that the X-File Failed to Convert Files Since it Shows that Files Were Not Converted For Long Periods of Time

Assuming *arguendo* that ER Ex. 9 is any indication of when files were transmitted onto the EVS network from the X-File 3, the time period in between each file's "date modified" time stamp is significant with regard to the functioning of the X-File 3. Hedrick testified multiple times that ER Ex. 9 showed that the X-File 3 was functioning at the time indicated by the time stamp. (Tr. 700: 17-21; 701-7-9; 710:12-15). Noticeably for a majority of the files, the date modified time stamps show that the time between each file transferred on September 5, 2016 was no more than seven minutes apart, with the exception of three separate periods of time with a much longer duration between file transfers. For example, the first long period of time where no files were transferred appears between 8:51 AM and 10:12 AM. (*Compare* bottom of page 4, ending with 8:50 AM, to top of page 3, beginning with 10:13 AM, in ER Ex. 9). Prior to 8:51 AM, between 8:22 AM and 8:50 AM, files were being transferred within a minute or two apart. It appears that for 1 hour and 21 minutes between 8:51 AM and 10:12 AM, no files were converted and transferred from the X-File 3 into the EVS network.

Between 10:13 AM and 10:43 AM³⁹ files were being transferred on average about a minute and a half minute apart. Starting at 10:44 am, another long gap appears between 10:44 AM and 11:18 AM, showing that no files were transferred for 34 minutes. (*See* page 3 of ER Ex. 9, showing file transferred at 10:43 AM then the next transfer at 11:19 AM). For the time span between 11:19 AM and 11:44 AM files transferred within minutes apart again.⁴⁰

³⁹ See on page 3 date modified time stamp, 10:13 AM; 10:14 AM; 10:18 AM; 10:21 AM; 10:22 AM, and compare to files on page 1 showing 10:26 AM; 10:27 AM (3 files); 10:28 AM; 10:30 AM (2 files); 10:31 AM (2 files); 10:32 AM (2 files--one on page 1 and the other on page 3 of ER Exh. 9); 10:35 AM (4 files); 10:36 AM, 10:37 AM (3 files); 10:38 AM; 10:39 AM; 10:40 AM; 10:41 AM (2 Files); 10:42 AM (4 Files--three on page 1 and one on page 3 of ER Exh. 9); 10:43 AM (4 Files--two on page 1 and two on page 3 of ER Exh. 9).

⁴⁰ See on page 3 the only exceptions would be three file transfers. One of those transfers, between 11:19 AM and 11:26 AM took 7 minutes, and the other two transfers between 11:28 AM and 11:34 AM and 11:35 AM and 11:41 AM each took 6 minutes.

The last long interval in which no files were transferred is between being 11:45 AM and 12:56 PM. (*Compare* bottom of page 3, showing a file transferred at 11:44 PM to top of page 2, showing the next transfer at 12:57 PM in ER Ex. 9). Once more, it logically follows that for 1 hour and 11 minutes, the X-file 3 was not converting and transmitting the files into the EVS Network. The file transfers appear to revert back to a minute or two apart from 12:57 PM to 1:05 PM. (*See* page 2 of ER Ex. 9).

Moreover, ER Ex. 9 fails to account for files transmitted on September 5, 2016 in the last three hours of the live broadcast, from 1:00 PM to 4 PM.⁴¹ The document purports to illustrate that files were being transmitted onto the EVS network before, and during the live broadcast from 11 AM until 1:05 PM. Yet, there is no indication as to which files may or may not have been transmitted after 1:05 PM. The files transferred between 1:06 PM and 4:00 PM are critical as the Respondent claims that four (4) clips did not air in the hour and 10 minute span between 1:45 PM and 2:55 PM. (*See e.g.*, ER Ex. 4).

4. For the First Time at the Hearing Respondent Claimed That Hess Misplaced Clips on Monday, September 5, 2016

Hedrick testified that during the live show, Monday, September 5, Executive Producer Adelson and Producer Skorich texted or called him to ask him about the status of certain files or features after he had already brought the files to Hess in the truck. Hedrick testified that on Monday, September 5, 2016, he provided Hess with the same clip twice, on several occasions. (Tr. 701:22-25--702:1-23). Neither Executive Producer Adelson nor Producer Skorich corroborated Hedrick's testimony about either of them asking him to bring the same clips to Hess on several occasions.

⁴¹ *See e.g.* page 2 in Pet Ex. 7 "NOTES On Monday we are five hours consecutive live with the first to hours on FSI (11 am to 1 PM) and the remaining three hours on the Fox Broadcast Network (1pm to 4 pm)).

When questioned by the Judge, Hedrick's testimony changed; Hedrick only vaguely recalled Skorich asking him about one feature that he brought Hess in the truck. Hedrick testified as follows:

JUDGE GREEN: Let me just ask you; there were – I think you testified that there was a couple of occasions where you were called by Peter Skorich or ken Adelson and they were missing a feature?

THE WITNESSES: yeah. Because I was on-site to help at it. We had myself, Lauren Adams, and Jim Roeder and Frank Raposo were on-site to edit for the show, because it was a bigger show. It was our Fox Broadcast. And so when we create something, we'd put it on a flash drive and then walk it into the TV truck.

And Pete would ask—I can't remember what the exact feature was, but I think it was something with graphics in it. And so I made that, took it in, handed it to Nate, and said hey, Pete, Nate's got the – whatever it was. Walked out. And then Pete sent me a note ten minutes later, and he was like, hey where's that thing? It's like well, I handed off to Nate.

So I put it back on a hard drive and took it back or back on a flash drive and took it back into him.

JUDGE GREEN: Did Nate say anything when you gave him the –

THE WITNESSES: I can't remember the exact wording, but it was something to the effect of, *hey, where's that thing? I said here it is. He goes I don't know what happened to it.*

(Tr. 719:23-25—720:1-22) (emphasis added).

Rather than Executive Producer Adelson corroborating Hedrick's testimony, Respondent attempted to produce a declaration by Lauren Adams.

JUDGE GREEN: Okay. So what is the – what are the declarations?

MR. MURPHY: The declarations would be from Lauren Adams, who was mentioned by Mr. Hedrick, about handing off clips to Mr. Hess of the morning of the race on the 5th, and one clip on Sunday, the day before. (Tr. 721:20-25).

Ultimately, Respondent declined to produce the declaration. (Tr. 748:12-15).

5. For the First Time at the Hearing, Respondent Claimed That A New Clip Other Than The Clip Named In Respondent's Exhibit 4 (Rundown Sheet) Failed to Air on Monday, September 5, 2016.

Hedrick offered testimony about some other clip, never before mentioned by Respondent, the PitFit Workout clip, having been on the EVS network but not making it to air. (Tr. 703:19-25; 704:13). There was no testimony on the record identifying the PitFit Workout clip as being the same clip as any one of clips that Respondent claims did not air. Producer Adelson testified that the following four clips did not air on Monday, September 5, 2016: 1) Visitor's Guide to Indianapolis, 2) Mello Yello Spotlight – JR Todd Crampton Workout, 3) Del Worsham's Mello Yello Car Feature, and 4) Tony Pedregon Races Worshom in Toyota Feature. (ER Ex. 4). Furthermore, Hedrick testified that the ER Ex. 9 only represents on-site features (video created on location). (Tr. 713:23-25). The record is devoid of testimony identifying the clips that did not air, named in ER Ex. 4 as "on-site features." Moreover, Hedrick did not identify in ER Ex. 9 any of the other three clips that did not air as being on the EVS network either. (*See e.g.*, ER Ex. 4).

6. Contrary to Its Claim Respondent Failed To Demonstrate it Suffered Any Harm as a Result of Clips Not Airing

Respondent consistently praised the production crew's work and told them that their experience with ESPN contributed to the success of the show. (*See e.g.*, GC Ex 9, 10; *see also*, GC Ex. 27A; 27B (Transcript)). The production crew was awarded a Silver Telly award in 2016, which is the highest ranking of Telly awards, a prestigious industry award honoring outstanding television programs, finest video and film productions. (Tr. 576:11-17; 577:3-5). (Tr. 577:3-5; *See also* GC Ex. 35). The production crew won the Silver Telly award for the live show, on Monday September 5, 2016, of the Indianapolis race, in the general-live events category. (Tr. 577:9-14; *See also* GC Ex. 35). Executive Producer Adelson testified that Hess was part of the crew that produced the September 5th live show what won the Silver Telly. (Tr. 579:8-10).

At the Las Vegas, Nevada race (October 27-October 30) Executive Producer Adelson and NHRA CEO Peter Clifford addressed the production crew in a group meeting and praised their work. (GC Ex. 18; Tr. 413:19-20; 414:17-18). Adelson and Clifford's praises were captured on audio recording by Dean. Dean recorded Adelson addressing the crew at the meeting Adelson praised the crew for this work and told them that the 2016 season was "the best success story in all of sports this year." CEO Clifford thanked the crew for all their work in making the NHRA a success in 2016; Clifford added "We couldn't be more happy with the way everything is being produced. We're hearing it from *our sponsors* from everybody." (GC Ex. 27A; 27B (Transcript at page 4) (emphasis added).

7. Respondent Claimed At The Hearing That Hess Regularly Lacked Authorization To Travel Work

In an attempt to call into question Hess' employment record and credibility, Respondent claimed that he consistently lacked authorization to travel work on Wednesday, and charged for unauthorized overtime. Hess testified that he worked on Wednesdays for about five (5) or six (6) events. (Tr. 737:18-25; 738:1). Hess' work on Wednesdays consisted of him traveling and shooting "scenics" which is video used during the show to identify the area surrounding where the drag racing event takes place. (Tr. 738:2-7). Hess testified that he incurred overtime each time he worked on Wednesdays because on travel days the clock starts running the moment the flight takes off, continues throughout travel and ends when work assignments are completed. (Tr. 738:8-13). Hess testified that he obtained Producer Skorich's approval each time he travel worked on Wednesdays, either by email or in a verbal conversation. (Tr. 738:25—739:1-8). Hess consistently testified on cross examination that he worked on Wednesdays with permission from Producer Skorich, and that he was not told by Technology Executive Rokosa that he was not authorized to work on Wednesdays. (Tr. 286:7-20; 287:24-25—288:1-10; 299:10-14).

Moreover, the record is clear—Rokosa testified that although the production crew books their own flights, he is charged with approving each request. (Tr. 629: 25—630:1-3).

Rokosa testified that at the race in Gainesville, he noticed that Hess arrived at the track on a Wednesday and was taking pictures (Tr. 625:23-25). Hess identified the Gainesville race as the third race of the season which took place March 17-20, 2016. (Tr. 747: 3-5; *see also*, GC Ex. 18). Rokosa testified that he came to find out that without prior authorization, Hess changed his timesheet and put himself in for travel work from 6:45 AM to 6:30 PM, effectively one-and-three-quarter hours of overtime. (Tr. 626:16-23;627:1-6; *See* Wednesday, March 16, 16 Timesheet in ER Ex. 7). On March 23, 2016, Rokosa wrote an email to Producer Skorich informing him that Hess put in for travel work on Wednesday with overtime. (ER Ex. 8). In contrast to Rokosa’s testimony, Skorich’s response to Rokosa’s March 23 email demonstrates that Skorich granted Hess permission to work on arrive at the Gainesville race on a Wednesday responding to Rokosa and Executive Producer Adelson by relaying the conversation between him (Skorich) and Hess. Skorich wrote, in pertinent part, that the scenic footage that Hess shot the year before was “really good.” (ER Ex. 8). Skorich wrote, “he[sic] asked if I wanted him to do it again [referring to shooting scenics], he didn’t want any extra dough to do it, just likes doing it. I said sure.” (*Id.*) Skorich went on to say “I don’t mind that he comes in on Wednesday to do it but I do mind incurring OT.” (*Id.*). Skorich’s response does not state that he communicated to Hess his concerns about incurring overtime. Consistent with Skorich’s March 23 email response, Hess testified that he emailed Producer Skorich to ask if he could arrive early to shoot scenics and that Skorich agreed to him going to the University of Florida to shoot statues of alligators. (Tr. 740:6-15). Hess produced the email in which Skorich granted Hess permission to film the alligator statues. (GC. Ex. 39).

Rokosa further testified that about two to three weeks after the Gainesville race, Hess, again, chose without authorization to change his travel day to Wednesday and put in for three (3) hours of overtime at the Las Vegas race. (Tr. 627:3-6). Respondent introduced a second time sheet for Hess dated “Wednesday, March 30, 16” in ER Ex 7. The timesheet shows that Hess signed in at 4:22 AM and signed out at 5:30 PM. (ER Ex. 7). The record reflects that the Las Vegas race, which corresponds with the dates of the timesheet, was the fourth race of the season. (GC Ex. 18). Hess identified the Las Vegas race as the Denso Spark Plug NHRA Nationals on the schedule in GC Ex. 18, which was held on April 1-3, 2016. (Tr. 746:23-25—7471-2). Hess offered unrebutted testimony that about one week before the race in Las Vegas, he had a telephone conversation with Skorich about shooting scenics of rock formations in a the Valley of Fire State Park. (Tr. 742:14-24). Skorich agreed to allow Hess to come early to Las Vegas and shoot the scenics for the Las Vegas race. (Tr. 742:20-22).

According to Rokosa, following Hess’ pattern of unauthorized Wednesday travel work, he confirmed with Producer Skorich and Executive Producer Adelson that Hess was not authorized to travel work on Wednesdays. (Tr. 627:14-17). Rokosa testified that he then sent Hess an email telling him that traveling on Wednesdays was unacceptable and that he should continue to travel Thursdays. (Tr. 627:18-22). Respondent did not produce the email that Rokosa allegedly sent to Hess telling him that Wednesday travel was unacceptable. Rokosa testified that after he told Hess to no longer put in for extra hours, Hess listened to his direction. (Tr. 671:3-6). Contrary to Rokosa’s testimony, Hess denied ever getting any emails, memo or other written correspondence following the Gainesville or the Las Vegas race telling him that travel work on Wednesdays was unacceptable. (Tr. 741:19-25—742:1-9; 743:6-16).

Rokosa even went on to testify that he denied two or three different travel requests by Hess because Hess was picking his own travel days. (Tr. 630:13-18). Respondent produced an email dated April 18, 2016 in which Rokosa informed Executive Producer Adelson and Producer Skorich of his intention to deny Hess' request to travel work on a Wednesday. (ER Ex. 7). The document shows that the travel date which Rokosa intended on denying was Wednesday, May 11, 2016. (*Id.*). Respondent provided no proof that Rokosa actually denied Hess' request to travel on May 11, 2016. However, Rokosa testified that after he denied Hess' travel, he sent Hess a memo or email advising Hess to act in accordance with Rokosa's directive. (Tr. 630:17-21). Rokosa testified that the email to Hess was corrective to the extent that Hess was acting independently from what Respondent asked of him. (Tr. 631:1-4). Respondent did not produce the email or memo that Rokosa allegedly sent to Hess telling him to act in accordance with Rokosa's direction. Hess testified that in early May 2016 Rokosa, did deny his early travel to the Epping race, but that other than the Epping race, Rokosa did not deny any of his Wednesday travel requests. (Tr. 743:17-22; 744:25—745:1-2). Hess identified the Epping races on the schedule as the NHRA New England Nationals which took place June 3-5, 2016. (Tr. 747:6-7; *see also*, GC Ex. 18). Hess produced an email dated May 2, 2016 in which Rokosa denied his travel for Epping, and asked him to rebook for travel work on Thursday. (GC. Ex. 40).

Almost immediately following Rokosa's denial on May 2, 2016, on May 5, 2016, Hess e-mailed Producer Skorich, Executive Producer Adelson, and Technology Executive Rokosa about travel working on Wednesday, instead of Thursday for the Bristol race. (GC Ex. 41). Hess identified the Bristol race as being the NHRA Thunder Valley Nationals which took place on June 17-19, 2016. (Tr. 747:8-9; GC Ex. 18). Hess testified that he requested Wednesday

travel because Bristol was a tough place to travel to which meant he would arrive late afternoon on Thursday if he traveled on Thursday. (Tr. 745:3-8). Producer Skorich responded asking Hess to get to the track earlier and approving Hess' request to travel on Wednesday. (GC Ex. 41).

The evidence demonstrates that Hess consistently sought and received approval from Skorich to travel work on Wednesdays. The record evidence also shows that both Technology Executive Rokosa and Executive Producer Adelson knew from the start of the season that Skorich granted Hess approval to travel work on Wednesdays. In that regard, Adelson was copied and responded to Skorich's March 23, 2016 email in which Skorich agreed to Hess shooting scenics at Gainesville. (ER Ex. 8). Nevertheless, Executive Producer Adelson testified that he learned sometime in early summer from Rokosa that Hess was arriving early and was doing unauthorized work. (Tr. 525: 6-12; 16-20). Yet another email dated July 1, 2016 from Hess to Producer Skorich and Adelson shows that he asked Skorich if he could fly in on Wednesday to shoot scenics for a FOX show. (GC. Ex. 34). Skorich responded, that same day, "This is fine with me." (*Id.*). Adelson admitted that Hess' July 1, 2016 email was a request for overtime. (Tr. 583:25--584:1-3). However, contrary to all the evidence, Executive Producer Adelson maintained that at some point in the season that Hess worked unauthorized overtime. (Tr. 584:8-10). Hess offered an unqualified denial of ever being criticized for putting in for overtime. (Tr. 310:25—311:1).

- a. Pit Producer Todd Veney's Testimony Regarding Conversations With Hess about Wednesday Travel Work is Immaterial to Hess Termination and Credibility

Respondent produced an email dated February 17, 2016 in which Producer Skorich informs Technology Executive Rokosa that Pit Producer Todd Veney would be traveling the

following week on a Wednesday “at the request of Nate Hess.” (ER Ex. 7). Skorich went on to say, “I don’t really mind that this happened this time but it’s not Nate’s call “. (*Id.*). Veney testified that at the first race of the season in Pomona, Hess told him that at the following race, he should arrive a day earlier, come up with things to do, and make more money. (Tr. 617:22-25—618:1-4). Veney testified that he followed Hess alleged advice. (Tr. 618:5). Veney also testified, that Rokosa told him not to make up his own travel, and that he did not receive any kind of discipline. (Tr. 618:7-14).

Hess testified that he worked eighteen races (18) races with Veney between February 2016 and September 2016. (Tr. 735:19-23). Hess worked three or four days a weekend with Veney. (Tr. 735:23-25--736:1-2). Hess testified that he spoke with Veney daily about 20 to 50 times per day almost every minute during the show. (Tr. 736: 3-8). The nature of the conversations between Hess and Veney were related to the show; Hess often asked Veney to get shots or video. (Tr. 736:9-14). With respect to the first race of the season, in Pomona, Hess did not remember telling Veney to arrange travel on Wednesdays. (Tr. 736:22-24). Hess denied ever telling Veney that showing up early was a way to make more money. (Tr. 736:25—737:1-2). Hess further testified that neither Rokosa, Skorich, or Adelson ever talked to him about Veney showing up on Wednesdays. (Tr. 737:3-11). Rokosa testified that he sent Hess a note regarding Veney arriving early. (Tr. 629: 16-18). However, Respondent did not produce any notes sent to Hess regarding him allegedly directing Veney to arrive early to work. Like Veney, Hess testified that he was never disciplined in any way about Veney arriving on Wednesdays to work. (Tr. 737:15-17).

8. Respondent Suggested That Hess’ Inexperience Played A Role in Clips Not Airing, Yet Respondent Replaced Hess With Paul Kent - Who Never Performed the Tape Producer Role

While Respondent consistently claimed that Hess was not seasoned and/or lacked experience, Respondent inexplicably chose to replace Hess with EVS Operator Paul Kent. (Tr. 582:11-15; 21-23). In the words of Executive Producer Adelson, Kent was given a “battlefield promotion” for the remainder of the season. (Tr. 583:5). According to Adelson, Kent’s promotion was based on Kent having been at the show “most of the year” and having had worked with Producer Skorich in Detroit. (Tr. 582:23-25). When having considered Hess for the tape producer role at the start of the season, Adelson testified to having evaluated candidates, like Rich Stempler, who had many years of experience in the tape producer role. (Tr. 521:15-25). Yet with Kent, Executive Producer Adelson was not sure if Kent had any prior experience working as a tape producer, and was certain that Kent never held the tape producer role on the Mello Yello drag races. (Tr. 582:6-11).

EVS Operator Paul Kent testified on behalf of the Respondent in the representation case. Kent also appeared in the Respondent’s campaign video in which the Respondent asks employees to “Vote no so that we can continue to work together, and continue this great momentum.” (Tr. 162:20-21; Pet. Ex. 5). Kent was hired back in 2017, in place of Hess, and continues to work for the NHRA in the 2018 season. (Tr. 194:8). Kent testified that he worked with NHRA Director Jim Sobczak in Detroit, and that as a freelancer it was important for him to network otherwise he does not get work. (Tr.201:21-25—202:1-7).

IV. ARGUMENT

A. NHRA Violated Section 8(a)(3) of the Act By Discharging Hess on September 14, 2016

In order to establish unlawful discrimination under Section 8(a)(3) and (1) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence

the following elements, either by direct or circumstantial evidence: (1) the employee was engaged in protected activity; (2) the Respondent knew or suspected that the employee engaged in such conduct; and (3) the Respondent harbored animus and its animus to that activity “contributed to” its decision to take an adverse action against the employee. *Director, Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line* framework, “all cases alleging violations of Section 8(a)(3) and (1) tur[n] upon Respondent motivation.” *Limestone Apparel Corp.*, 255 NLRB 722 (1981). To meet the General Counsel’s initial burden of persuading the trier of fact that the Respondent engaged in unlawful discrimination, it may offer proof that the Respondent’s reasons for the personnel decision were false or pretextual. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003); *Real Foods Co.*, 350 NLRB 309, 312 fn. 17 (2007).

Once the General Counsel establishes the prima facie elements of a motive-based discrimination case, the burden of persuasion then shifts to the Respondent to prove that it would have taken the same adverse employment action, irrespective of the employee’s protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983); *Manno Electric*, 321 NLRB 278, 280 n. 12 (1996). For the Respondent to meet its burden, it “cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.” *Serrano Painting*, 332 NLRB 1363, 1366 (2000).

It is also well established Board law that the knowledge element of the *Wright Line* test can be inferred from the timing of a discharge and from the pretextual nature of the reasons

advanced by the Respondent for the discharge. *Metro Networks, Inc.*, 363 NLRB 63 (2001) (citing *Medtech Security, Inc.*, 329 NLRB 926, 929-930 (1999) (circumstantial evidence, including timing, general knowledge of union activity and pretext, supported finding of Respondent knowledge); *Darbar Indian Restaurant*, 288 NLRB 545 (1988) (finding of knowledge based on Respondent's general knowledge of union activity, the timing of the discharge, the 8(a)(1) violations found, and pretext given); and *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), *enfd.* mem. 97 F.3d 1448 (4th Cir. 1996) (Board may infer knowledge from circumstantial evidence including timing, general knowledge of union activity, animus, and disparate treatment).

If the Respondent's proffered defenses are found to be false or pretext, i.e. were not in fact relied on, the Respondent fails by definition to show that it would have taken the same action, and there is no need to perform the second part of the *Wright Line* analysis. *La Film School, LLC and its Branch, La Recording School LLC*, 358 NLRB 130, 140 (2012). Further analysis is required if the Respondent raises a "dual motivation" defense, that is, the Respondent asserts that even if an invalid reason might have played some part in its motivation, it would have taken the same action. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 323, 233 (D.C. Cir. 2006). The *Wright Line* test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302, 1302 n.2 (1984).

As set forth herein, the evidence shows that Hess engaged in union activity, the Respondent was aware of Union activity among the production crew and the Respondent was hostile to the Union. The evidence further shows that the timing of Hess' discharge, the small size of Hess' work space and the pretextual nature of the Respondent's defenses lead to the

conclusion that the true reason for Hess' discharge was the Respondent's hostility to his Union activity.

1. Hess Engaged In Union Activities

Hess was one of only six employees who attended the first meeting that Union Representative John Culleeny held during the Seattle, Washington race weekend from August 5-7, 2016. Hess signed a Union authorization card on August 6, 2016 at that first meeting, and attended all the other meetings held by the Union until he was terminated. Hess attended the next meeting held during the Brainerd, Minnesota race between August 18-21, 2016. Hess went to both meetings during the Indianapolis race weekend held on consecutive nights, Friday, September 2nd and Saturday, September 3rd.

After the first meeting Hess unquestionably became a Union leader of the organizing drive. Hess relayed messages from Culleeny to other employees and regularly spoke at Union meetings. Graphics operator Piner testified that Hess invited him to the first meeting that he attended in Brainerd. Between August 6, 2016 and his termination on September 14, 2016, Hess spoke with employees about the Union, invited employees to Union meetings, and distributed electronic links to Union authorization cards. The record establishes that on September 3, 2016 Hess sent EVS Operator Kent a link to the Union meeting. Hess testified that prior to sending Kent the link, he spoke to Kent several times on the truck (Mobile Unit A) where they worked about the Union, and invited Kent to the Union meeting at Indianapolis. The record shows that Kent responded to Hess' September 3, 2016 text message stating, "Got it, Probably not going to make it down there tonight " The evidence easily establishes Hess engaged in Union activity.

2. Respondent Knowledge of Hess' Union Activities Should Be Inferred from the Respondent's General Knowledge of Union Activity Among the

Production Crew, the Close-Knit Working Environment, the Timing of Hess' Discharge and the Pretextual Nature of the Respondent's Defenses.

a. Respondent's General Knowledge of Union Activity

Executive Producer Adelson, Technology Executive Rokosa, and Vice President of Human Resources Gurrola admit to learning of Union activity during the Indianapolis race weekend. Vice President of Human Resources Gurrola did not attend the Indianapolis race, but she testified that on September 3, 2016, she received a telephone call from NHRA in-house Counsel Linda Louie about the Union campaign. Gurrola testified that she recalled the date specifically because she had to cancel her birthday plans. Rokosa admitted that on Friday, September 2, 2016 he learned from Fox Executive Frank Wilson that there was Union organizing going on. Rokosa unequivocally testified that he learned from Wilson the night before he discussed it with Executive Producer Adelson, and that Wilson told him that he found out about the Union organizing from Fox Executive Greg Oldham. Executive Producer Adelson admitted the Creative Director Stoll told him on the morning of Sunday, September 4, 2016 that the night before he (Stoll) watched the crew attend a union meeting, and talked to some of the employees as he smoked a cigarette outside the crew hotel. Adelson testified that he asked Stoll for the names of the employees involved. Adelson testified that Stoll did not provide him with employees' names that Stoll saw and spoke with. Stoll did not testify at the hearing.

b. Respondent Knowledge of Hess' Union Activities is Inferable from the Working Environment

The Board has long recognized that it is reasonable to infer that management of a small plant or department is likely to gain knowledge of the identity of employees who are involved in union activities. *See Wise Plow Welding Co.*, 123 NLRB 616, 1959); *D&D Distribution Co. v. NLRB*, 801 F.2d 636 at fn.1 (3d Cir. 1986). ("The essence of the small plant doctrine rests on the view that an Employer at a small facility is likely to notice activities at the plant because of the

closer working environment between management and labor.”). *Frye Electric*, 352 NLRB 345, 351 (2008) (knowledge activity inferred where workforce consisted of 35 employees); *General Iron Corp.*, 218 NLRB 770, 778 (1975) (“about 25 employees”); *Sutherland Lumber Co.*, 176 NLRB 1011, 1019 (1969) (about “40 people”).

Hess worked in 700 square foot trucked called Mobile Unit A where he sat in close proximity to members of management. Hess sat in the tape room shoulder to shoulder with fellow production crew members, the EVS (Tape) operators, and only five feet from his direct supervisor Peter Skorich in the main production area. Members of management and the production crew easily accessed each other’s work areas as the tape room and main production area were separated only by a retractable monitor wall that was kept open throughout the 2016 season. Hess and Skorich entered each other’s workspace about twice per day over the course of a race weekend to talk as needed.

The record evidence establishes that Hess’ work area was so small that he could hear discussions among the front bench where Technical Director Gordan McBride, Director Jim Sobczak, and Skorich sat, and he was able to have discussions in a normal tone with Skorich without getting up from his seat in the tape room. Not far behind the first bench sat Executive Producer Adelson and Fox Executive Greg Oldham in the middle bench, along with Fox Executive Frank Wilson, and Technology Executive Rokosa in the back bench. It was in this work environment that Hess openly talked to members of the production crew about the Union. In fact, EVS operator Paul Kent was one of the crew members that Hess spoke to on the truck and invited to the Union meeting on September 3, 2016 during the Indianapolis race weekend.

In total Hess was only one of twenty (20) individuals that worked in Mobile Unit A. Individuals other than management included video technicians, truck engineers and the Engineer in charge. The size of Hess’ workplace and his discussions of the union in this small workplace

is a basis for inferring knowledge of union activity. *See e.g., Frye Electric*, 352 NLRB 345, 351 (2008).

i. Admitted 2(11) Supervisors Sobczak and Stoll Knew About Union Activity at the Production Crew's Hotel

Hess' Union activity extended to other areas where he was in close proximity to management. In that regard, Hess talked with members of the production crew at the TV Compound, and at the production crew hotel where Union meetings were held. Director Sobczak normally stayed at the same hotel where production crew members stayed for the weekend.

Over the course of the Indianapolis race weekend, August 31-September 5, 2016, the Union held two meetings on consecutive nights at the production crew's hotel. Hess attended both of the Union meetings. The uncontroverted record establishes that Director Jim Sobczak and Creative Director Brian Stoll both stayed at the crew hotel during the Indianapolis race weekend and each observed the production crew members' attending the Union meetings that weekend. The record further establishes that Creative Director Brian Stoll informed Hess about the first Union meeting held over the course of the Seattle, Washington race weekend on August 5-7, 2016. Stoll was also the supervisor that informed Executive Producer Adelson at the Indianapolis race weekend, August 31-September 5, 2016, that he watched employees attend a Union meeting at the crew hotel, and spoke with some of those employees.

EVS operator Dean and Graphics operator Piner both testified that on one of the Indianapolis race weekend evenings, they saw Sobczak seated at the bar directly outside where the Union meeting was being held. Union Representative John Culleeny testified that another member of the crew told him that Sobczak was watching the crew coming in and out of the Union meeting during the Indianapolis race weekend.

Other than regular production crew members, members of the Respondent's full-time staff who were regularly stationed in Glendora, California, like Editor Francisco Raposo knew of the Union organizing drive at the Indianapolis race. Raposo consistently testified that he spoke to Director Sobczak outside of the crew hotel about the Union on either Saturday or Sunday of that weekend. Raposo testified that Sobczak told him that he that if he decided to join the Union, he may get a raise but may lose his 401K, and health insurance.

The record is replete with evidence to support the Respondent's knowledge of Hess' Union activity based on widespread general knowledge among supervisors who worked closely with Hess and stayed at the same hotel as Hess, in areas where Hess' Union activity was apparent. As set forth in more detail below, the timing of Hess' discharge and the pretextual reasons put forth by the Respondent for his discharge also support the inference of Respondent knowledge of Hess' Union activity.

c. Respondent Knowledge of Hess' Union Activities is Inferable From The Confluence of Circumstances

It is well established that where there is no direct evidence, knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn. *BMD Sportswear*, 283 NLRB 142 (1987). In *Montgomery Ward*, 316 NLRB 1248, 1253-1255 (1995) the Employer had only general knowledge of Union activity but exhibited strong union animus by making statements made like the facility would be unionized over its "dead body," discriminatees noticed more supervisors in their work area after distributing union authorization cards, and the discriminatees were later discharged within days of getting cards signed. *See also Pan-Osten Co.*, 336 NLRB 305, 308 (2001)) (despite no evidence of the employer's specific knowledge of a discriminatee's union activity, the Board

drew a reasonable inference of the discriminatee's union activity where the employer was aware of union activities among its employees generally and displayed hostility toward a known union supporter.

Here, similar to the discriminatees in *Montgomery Ward*, the confluence of circumstances supports a finding that Respondent knew of Hess' Union activities based the Respondent's general knowledge of Union activity, and the timing between his discharge and anti-union statements made by Respondent's supervisors Producer Skorich and Vice President of Human Resources Gurrola. The record is replete with Respondent admitting to learning of Union activity at the Indianapolis race—Technology Executive Rokosa learned of Union activity on September 2, 2016, Vice President of Human Resources learned on September 3, 2016, and Technology Executive Adelson learned of Union activity on September 4, 2016.

There is no question that Hess was terminated a little over a week after engaging in Union activity at Indianapolis. The record establishes that Hess distributed a Union authorization card to his future replacement Paul Kent on September 3, 2016, and attended two Union meetings on September 2nd and 3rd. The uncontroverted record establishes that within the two week period after Indianapolis, during which the Employer had two to four internal meetings about the Union, Producer Skorich made an anti-union statement to Raposo that the Union guys “would be taken care of” and nipped in the bud.” *See discussion infra*. The record further establishes that Hess was terminated on September 14, 2016, and within two to four days after Hess termination Vice President of Human Resources arrived at the race track in Charlotte North, Carolina and told the crew in a captive audience meeting that she “knew” some employees had been talked to about the union and that a lot of employees “may or may not have been asked to sign a card” in addition to other unlawful statements. *See discussion infra*.

The confluence of these circumstances warrants a finding that the Employer knew of Hess' Union activity.

3. The Respondent Harbored Animus Against the Union and Hess' Union Activity
 - a. Skorich Made an Unrebutted Threat About Union Activity

Coercive statements and conduct not alleged as independent violations still serve as evidence of anti-union animus. *SCA Tissue North America, LLC*, 338 NLRB 1130, 1135 (2003); *see also U.S. Coachworks, Inc.*, 334 NLRB 955, 956 (2001) (finding animus in coercive statements of supervisor not alleged as unfair labor practices). Threats need not be explicit if the language used by the employer can reasonably be construed as threatening. *NLRB v. Ayer Lar Sanitarium*, 426 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001). *See e.g., Double Eagle Hotel & Casino*, 347 NLRB 112, 122 (2004) (finding an implied threat where supervisor told employee "if you're going to get caught up in this slot mess, I can take care of that too.")

The record establishes that Producer Skorich made unspecified threat to Editor Raposo which provides probative evidence of the Respondent's anti-union animus. The uncontroverted record establishes that in the two week span after the Respondent learned of Union activity at Indianapolis on September 2, 2016, Raposo complained to Skorich about an error made by the truck guys. Raposo testified that video he was editing was short by two minutes. Upset by the error, Raposo told Skorich, "you know, these Union guys, they want more money; but they can't do their job right." Raposo testified consistently on direct and cross examination that Skorich responded, "Oh don't you worry about that. That's going to get taken care of. That's going to nip this in the bud." The context establishes that Raposo was criticizing the "Union guys."

Skorich responded with a phrase that has a negative connotation. In that regard “nipped in the bud” means to stop or prevent something at the beginning or early phase before it becomes too difficult or unmanageable. Similarly, the phrase “taken care of” has a negative connotation; to “take care of something” means to dispose of it.” Here, it is clear that when Skorich responds and uses the word “that,” Skorich was referring to the Union. Skorich was effectively stating that the Union would be disposed of and halted. Therefore, Skorich’s statement demonstrates the Employer harbored anti-union animus.

b. Hess’ Discharge About Ten Days After Union Meetings at Indy and After Respondent Learned of Union Activity Among the Production Crew Raises an Inference of Unlawful Motive

The Board has long held that where adverse action occurs shortly after an employee has engaged in protected concerted or union activity an inference of unlawful motive is raised.

Manorcare Health Services- Easton, 356 NLRB No. 39 slip op. at 3, 25 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011); *Bates Paving & Sealing Co.*, 364 NLRB No. 46, slip op. at 4 (2016) (timing indicative of animus where employee was discharged 2½ weeks after speaking out at a meeting). Timing alone may be sufficient to establish that the union animus was a motivating factor in a discharge decision. *Advoserv of New Jersey Inc.*, 363 NLRB No. 143 slip op. at 31 (2016).

The timing of Hess’ discharge supports a finding that the Respondent harbored anti-union animus and as set forth above supports an inference of knowledge of such activity. Hess was discharged on September 14, 2016 – a little over a week after the Respondent admits it learned of Union activity at the Indianapolis race held August 31-September 5, 2016, Hess distributed a link to a Union authorization card on September 3, 2016 and attended two Union meetings at the production crew hotel during the Indianapolis race. No more than two weeks after Hess distributed the Union card on September 3, 2016, Human Resources Representative Gurrola held

a captive audience meeting with about 40 announced at a captive audience meeting during the Charlotte Race (September 16-18, 2016) that she *knew* that some employees were approached about the union and may have been asked to sign a Union card. Gurrola outright stated to the employees, “we don’t want you to sign the card.” Moreover, the record establishes that Hess’ discharge on September 14, 2016 came about 30 days before the Union filed its petition on October 20, 2016. In addition Hess’ received a performance based wage increase on September 1, 2016 and the record shows that the Respondent learned of Union activity on September 2, 2016. Such suspicious timing of Hess termination provides strong evidence of animus.

c. Vice President Gurrola Made Unlawful Statements to Production Crew Within Days of Hess’ Termination

The Respondent's animus is further demonstrated by its contemporaneous 8(a)(1) violations. Here, the Respondent’s animus towards union activity is demonstrated by Gurrola’s Section 8(a)(1) statements conveying the impression of surveillance, soliciting grievances and promising to remedy them and threats. These 8(a)(1) statements were made within a short time after Hess’s discharge.

In *Electronic Data Systems Corp.*, 305 NLRB 219 (1991), the Board found that the employer’s change in a clock in policy which coincided with the employer’s knowledge of union activity, and no explanation for the timing of the change supported an unlawful motivation. Similar to *Electronic Data Systems Corp.*, after Hess was discharged on September 14, 2016, within two to four days later, Vice President of Human Resources Gurrola arrived in Charlotte, North Carolina for her second race of the season. The Charlotte Race was held on September 16-18, 2016. Remarkably, prior to the Respondent learning of Union activity at Indianapolis, Gurrola did not have the time to attend the 17 races prior to the Charlotte, North Carolina race. Gurrola testified she only attended the first race of the season which was held at a racetrack 20

minutes from the Employer's headquarters. Gurrola's only explanation for her arrival to warn employees about the Union activity, and that she wanted to see what was going on and to see some employees. (Tr. 493:11-16).

Sometime over the course of the Charlotte race weekend (September 16-18, 2016), Gurrola held a captive audience meeting with at least 40 members of the production crew in the catering tent. Respondent senior official CEO Peter Clifford was present along with all of management such as Executive Producer Adelson, Producer Skorich, Director Sobczak, Technology Executive Rokosa. Prior to Charlotte, neither EVS operator Dean nor Graphics operator Piner never met Gurrola. Gurrola explicitly told the production crew, "***I know*** that some of you have been approached and talked to about perhaps going in the union ..." (emphasis added). Gurrola also warned employees that forming a union was not a productive relationship, "there [would be] consequences." Gurrola elaborated that the consequence of Unionizing would be the end of a good working relationship between the NHRA and the employees. In that connection, Gurrola stated, "I'm a hundred percent for you guys out there. To make this a good working relationship between the two of us. When you bring the union in, that model goes out the door. Just so you know." Gurrola urged employees, "if you have issues or anything you wanted to discuss,you can come to me. Bring them to our attention and we'll, you know, we'll look into it." Gurrola further pled with employees to "[G]ive us an opportunity to fix issues." These statements as discussed *infra* amount to 8(a)(1) statements. These statements made within, at most, four days of Hess' termination provide strong evidence of anti-Union animus.

- d. The Record Firmly Establishes That The Respondent Harbored Anti-Union Animus.

The Board has long held that an Employer's expression of views or opinions against a union may be used as background evidence of animus, even if it is not a violation in and of itself. *Mediplex of Stamford*, 334 NLRB 903 (2001) (citing *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Lampi, LLC*, 327 NLRB 222 (1998), enf. denied 240 F.3d 931 (11th Cir. 2001); and *Gencorp*, 294 NLRB 717, 731, fn. 1 (1989).

i. The Respondent Fabrication of Piner's Discharge Shows Union Animus .

The preponderance of the evidence shows that the Respondent's claim in its position statement dated December 9, 2016 that Piner was ineligible to vote in the Union election because he was terminated for unacceptable performance on September 19, 2016 is utterly false. Contrary to Respondent's contentions, the record establishes that Rokosa was impressed with Piner's work, offered him work in November 2016, and discussed Piner's availability with him for the 2017 season on several occasions. There is no logical explanation any Respondent would offer a terminated employee work or inquire as to the employee's work availability. Any claim that Rokosa did not know of Piner's alleged egregious conduct and poor quality of work is simply not credible.

In addition, Respondent attempted to substantiate its claim that Piner was terminated by creating an Event Worker Report form stating that he was terminated for unacceptable performance. The record establishes that Piner was eligible to vote in the Union election. Eligible voters were those who worked two events for a total of 40 or more working hours. Piner testified that he worked five events in the 2016 season. The Respondent did not place Piner's name on the voter list, so Piner did not receive a ballot. Piner cast a ballot, and because his name was not on the voter list his ballot was challenged and was not counted on December 2, 2016. Piner's vote became a determinative challenge. Piner's Event Worker report produced in the

representation case raises the question: Why would there be a form stating that Piner was fired in September 2016 and yet evidence that he was being asked to work as late as November 2016? The only conclusion that must be drawn is that Respondent fabricated Piner's termination to preclude him from voting in the Union election. Therefore, the claim that Piner was terminated evinces the Respondent's strong Union animus and demonstrates the Respondent's willingness to fabricate defenses.

Moreover, Rokosa's statement to Piner on December 1, 2016 that he could not provide him with a specific job offer until after the Union election shows further Union animus. There is no dispute that ballots were counted in the mail ballot election on December 2, 2016, the day after Rokosa and Piner spoke. Rokosa did not rebut Piner's testimony regarding what Rokosa said about not offering jobs until the Union election. The record further establishes that Respondent's claims that it could not make job offers until after the Union election is not based in objective fact. Indeed, Rokosa made the same statement in an email dated November 15, 2016. Contrary to Rokosa's statements, Adelson admitted that offers were made to a small group of employees in the petitioned for unit before ballots were mailed out in the Union election on November 15, 2016. Therefore, Rokosa's statement is coercive statement and evidence of animus.

Lastly, Rokosa's response to Piner's email on January 1, 2017 supports an inference that the Union election was the reason for Rokosa retracting Respondent's offer to Piner for 19 races in the 2017 season. There is no dispute that Piner and Rokosa had a telephone conversation about Piner working in the 2017 season on December 1, 2017. Rokosa denies offering Piner 19 events for the 2017 season in that telephone call. Yet, Rokosa's denial is contradicted by his own statement in an email to Piner on January 1, 2017. The record establishes that Piner

contacted Rokosa on January 1, 2017 by email. Piner wrote Rokosa on January 1, 2017 asking which 19 events the Respondent scheduled him for in the 2017 season. Rokosa responded that same day that “Since we last spoke there has (sic) been some changes in the production for next year. At this time we are not in a position to offer a position on the schedule.” Rokosa did not respond to Piner and say, “I did not offer you 19 events” or “I was only asking your availability.” Rokosa’s silence on this material point is tantamount to an admission. It is well settled that admissions may be implied from the mere silence of a party.” *Coca-Cola Bottling Co. Southeast, Inc.*, 313 NLRB 1197, 1200 (1994) (citing Jones, *Evidence* (6th ed. p. 524) (1972)). Piner’s consistent testimony should be credited on this point. The change Rokosa referred to in his email was Piner exercising his right to vote in the Union election. Based on the foregoing there can be no question that Respondent harbored anti-union animus.

ii. The Respondent’s Statements and Conduct After Learning of Union Activity Show Union Animus

The Respondent’s opposition to unionization is apparent by its actions in the last six races of the season, between September 16, 2016 and November 13, 2016. Gurrola expressly testified at the hearing that the Respondent did not want a Union represented workforce. To that end, in order to weaken the Union organizing efforts Gurrola attended the last six races, the Respondent held captive audience meetings, and Gurrola talked to employees in small groups.

Gurrola kept handwritten notes of her small group meetings with employees over the course of the last six races. Gurrola’s notes show that Gurrola gauged employees’ Union sentiments and kept a list of employees who were against the Union including Tom McJennett. Tom McJennett, would later appear in the Respondent’s campaign video, along with EVS operator Paul Kent, in which the Respondent asked employees to “Vote No” in the Union election. Gurrola’s notes further reveal that she discussed Union affiliation, work related issues

the production crew was experiencing, and the truck guys' ongoing complaints related to food. One of Gurrola's entry reads, "nickel + dime" which accurately captured EVS operator Dean's testimony of the Respondent's per diem policy.

Although not alleged as an unfair labor practice Respondent's conduct with regard to its per diem policy is evidence of union animus. *See Mediplex of Stamford*, 334 NLRB 903 (2001), *supra*. In *Curwood Inc.*, 339 NLRB 1137, 1147-1148 (2003) the Board found it unlawful for an employer to promise to improve pension benefits pre-petition filing where the employer was reacting to knowledge of union activity among its employees.

Here, similar to *Curwood Inc.*, the Respondent immediately after the Indianapolis race weekend began reacting to there being Union activity among the crew. Vice President of Human Resource Gurrola met and talked with employees in small groups starting in Charlotte, North Carolina. EVS operator Dean testified that he was part of a small group of employees that was complaining about the per diem policy at the Charlotte, North Carolina race. Dean testified that by the next race in St. Louis, Missouri on September 23-25, 2016, Respondent changed its per diem policy, and at the same time it was making budget cuts. Gurrola testified that she knew as early as February 2016 that the employees were dissatisfied with the per diem policy. Yet, the record evidence reveals that the Respondent did nothing for the entire season until after it learned of Union activity at Indianapolis (August 31-September 5, 2016). In fact, Gurrola had attended one race before the Charlotte, North Carolina race. The context of the per diem policy change establishes that Respondent was reacting to its employees' Union activities in an attempt to discourage Union activity.

The record evidence further shows additional Union animus almost immediately after the Union filed its petition. The Union filed its representation petition on October 20, 2016, about a

week before the second to last race of the season which was held in Las Vegas, Nevada on October 27-30, 2016. On October 25, 2016, Gurrola sent an email to employees characterizing the Union organizing drive as a desperate attempt to get the crew to be the Union's "paying customers." Gurrola made the Respondent's position clear, "our position is that a union is not necessary. Our preference is to deal with each of you directly and individually without you losing your right to make decisions about your job, and hopefully without you possibly being forced to pay the stagehands' union in order to continue to work." (GC Ex. 8).

The Respondent reiterated its anti-union position at the Las Vegas Race weekend (October 27-30, 2016). The Respondent held another captive audience meeting where Executive Producer Adelson, and CEO Peter Clifford addressed employees. Adelson told employees of NHRA's desire to deal with employees directly and individually. Adelson told employees that he wanted to be able to talk to employees directly and take the success experienced by the crew in 2016 to "the next level." Adelson warned employees that bringing in a union takes away the opportunity to replicate the successes of 2016. Adelson ended the meeting by telling the employees that the Respondent had time to talk and "take individual questions."

The Respondent's hostility toward the Union is also evident in the emails sent to the production crew on November 7, 2016, November 10, 2016, and November 15, 2016. In those emails Gurrola repeatedly informed employees that the Union representation was not in employees' best interest or the interest of the sport of drag racing. (*See e.g.*, GC Ex. 9, 10, 11). In the November 10, 2016 email, Gurrola urged employee to maintain the momentum of a successful season "[a]s, a team working as one," meaning a Union free workplace. In the same vein, the Respondent provided a link in the November 15, 2016 email to a campaign video with statements from employees about the great experience they had in 2016, and with drivers talking

about the great success the show experienced during the 2016 season. (GC Ex. 11). At the end of the campaign video, Gurrola told employees “Vote No on the Union, so we can continue to work together and continue this great momentum.” The record clearly establishes that the Respondent harbored anti-union animus.

4. The Record Establishes The Pretextual Nature Of Hess Discharge And That Respondent Seized on The Failure of Clips to Air to Precipitously Discharge Hess

a. Skorich, Adelson, and Rokosa All Knew There Were Problems With The X-File at Indianapolis

The record establishes that Skorich, Adelson, and Rokosa all knew at some point during the Indianapolis race weekend that there were problems with the X-File. Hess’ unrebutted testimony establishes that Skorich knew there were problems with the X-File on September 5, 2016. Technology Executive Rokosa and Executive Producer Adelson’s responses to Skorich’s September 14 to management about Hess’ termination establishes that at least earlier at the Indy weekend they knew there were problems with the X-File. The Respondent’s knowledge that the X-File malfunctioned no more than three days before Monday, September 5, 2016 during weekend at the Indianapolis race provides strong basis for the Respondent to conduct an investigation into the X-file’s function on Monday or any investigation at all prior to terminating Hess.

The record establishes that the X-File is the only piece of equipment that every clip must be converted by into a readable format before being transferred onto the EVS network where it becomes accessible for an EVS operator to air during the show. Rokosa’s testimony establishes that he understands the X-File’s function as the access point before clips can be transferred to the EVS network. Rokosa’s undisputed knowledge of problems with the X-File 3 earlier in the weekend, his understanding of the X-File’s function, coupled with his knowledge that the Del

Worsham Mello Yello Car clip did not air are facts that reasonably would have warranted an investigation into whether the X-File failed to convert the Del Worsham Mello Yello Car Clip

- b. Rokosa Knew There Were Problems with the X-File, Yet Rokosa Failed To Investigate—He Did Not Speak With Hess or Anyone Else in the Tape Room Who was Directly Involved With The Airing of the Mello Yello Clip

Evidence that the respondent failed to adequately investigate alleged misconduct supports an inference of animus and discriminatory motivation. *Relco Locomotives Inc.*, 358 NLRB 298, 311 (2012); *See also Rood Trucking Co.*, 342 NLRB 895, 899 (2004); *Golden State Foods*, 340 NLRB 382, 385 (2003) (a failure to investigate is “strong evidence of pretext”).

Here, the Respondent had plenty of time and opportunity to investigate the reason for the Del Worshom Mello Yello Clip allegedly not airing. Rokosa testified that he was present in production area when a clip failed to air. Rokosa further testified that at the end of racing on Monday, September 5, 2016 he found the clip on the EVS network. Rokosa had the opportunity to on Monday, September 5 to find out if the clip he allegedly witnessed failing to air was the same clip that he found on the EVS network or a different clip, what time the clip was transferred on the EVS network to determine if it the clip was on the network at the time that he witnessed failure, and the reason for the clip failing whether equipment or a crew member’s error. Yet Rokosa failed to do so. The record is clear that Rokosa had no discussions with any crew members directly involved with airing the clips on Monday, September 5, 2016.

Furthermore, the record establishes that Hess was not terminated for another 9 days after the Indianapolis race, and Rokosa learned that there were other clips that did not air on September 7th or 8th. Rokosa had about another week to investigate what happened with respect to the other three clips. Neither Rokosa nor any other Supervisor called Hess or any other crew member who worked on the live broadcast on Monday, September 5, 2016 to determine the

reason for clips not airing. The only call Rokosa made was to terminate Hess. Despite having ample opportunity, Rokosa testified outright that he did not speak to anyone directly involved with airing the clips any questions about what happened.

The Respondent's failure to investigate what it considered an extraordinary event or even talk about it among management until days later is in and of itself suspect, and more so in light of it knowing that the X-file malfunctioned no more than three days before. Thus Respondent's failure to investigate is strong evidence of pretext.

c. Rokosa's Testimony About the Del Worsham Mello Yello Clip is Contradicted by The Respondent's Own Evidence

The Respondent introduced its Ex. 9 through Director of Broadcasting Hedrick, which purports to show all the video files that were loaded on the EVS network on Monday, September 5, 2016, and ready to be aired. Rokosa consistently maintained that the Del Worshom Mello Yello clip failed to air not because of any equipment malfunction; rather it was Hess' inability to find the clip on the EVS network and play the clip.

Rokosa testified that the Mello Yello clip he found on the EVS network at the end of the live show on Monday, September 5, 2016 was the Del Worshom clip. Rokosa's testimony was completely contradicted by Hedrick's testimony. While reviewing Exhibit 9, Hedrick testified that the Mello Yello clip was not on the EVS Network.

In an attempt to reconcile this discrepancy, Respondent's counsel Murphy implied that Hess may not have sent, or deleted the Del Worshom Mello Yello clip from the EVS Network since Hess was responsible for creating the melts. *See e.g.* (Tr. 717:20-15—718:1-10). Yet again, the record evidence contradicts this absurd explanation for the Mello Yello clip not being listed in Exhibit 9 as a clip which was loaded on the EVS network and ready for air. The

Respondent explicitly wrote in its position statement that Dean was responsible for melts. (*See* GC Ex. 5 ¶9 at page 13 of 16).

The only logical and consistent explanation on the record as to the reason for some clips not airing on Monday, September 5, 2016, were provided by Hess and Dean; the X-file 3 failed to convert certain files, Hess attempted to convert some files by using his personal computer but failed, and Creative Director Stoll managed to convert some of the files, and those that Stoll was unable to convert did not air.

5. Reasons Given for Hess' Termination Show Pretext.

- a. Reason Given to Hess for His Discharge Shifted from "Difficulties on Friday" to Reason Being Video Clips Failed to Air Showing Pretext

When an Employer is unable to maintain a consistent explanation for its conduct, but rather resorts to shifting defenses, "it raises the inference that the Respondent is 'grasping for reasons to justify' its unlawful conduct." *Meaden Screw Products Co.*, 336 NLRB 298, 302 (2001), citing *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983). *See also Master Security Services*, 270 NLRB 543, 552 (1984). In *St. Francis Regional Medical Center and SEIU Healthcare Minnesota*, 363 NLRB no. 69 (2015), at the hearing the Employer testified that two employees were discharged for violating its confidentiality policy, yet the Employer never mentioned the confidentiality policy at any time during its investigatory meetings with the employees.

In the instant case, the reason given to Hess by Producer Skorich at the time of his termination, on September 14, 2016, shows that Skorich provided shifting and vague reasons, and never once mentioned clips failing to air. Skorich's September 14 email demonstrates that

the reason Hess was given for his termination was, “difficulties present as early as Friday, things were not able to be found, lack of organization. . . .”

It is apparent from both the September 14 email and Hess’ testimony that as soon as Skorich told Hess he was terminated effective immediately, Hess blurted out an explanation about the live show on Monday, September 5, 2016. In Hess’ version of events, Hess reminded Skorich that the reason video did not air was because the X-File 3 failed, and in essence questioned if the video failing to air was the reason for his termination. In that regard Hess stated, “you are aware that the Xfile went down and that’s why we didn’t have the video we needed for the Indy race.” In Skorich’s version, Hess said “you do know we had major equipment malfunction” Hess testified credibly as to his conversation with Skorich at the time of his termination on September 14, 2016 as shown by the similarities between Hess testimony and Skorich’s September 14 email; thus Hess’ un rebutted testimony about this conversation should be credited.

Skorich’s response to Hess’ defense, in either account, reveals that the Respondent pointed to other reasons to justify its conduct. Skorich told Hess that he was aware of the equipment malfunction but there were difficulties as early as Friday. Hess testified that Skorich mentioned “Friday and Saturday.” Skorich’s response to Hess’ defense that the X-file failed makes clear that aside from any problems that resulted from equipment failure, the Respondent was terminating Hess for some supposed performance issues on at least Friday, September 2, 2016, the day after Hess received a performance based raise on September 1, 2016.

Consistent with what happened during the telephone conversation with Skorich, Hess testified on cross examination that Skorich *told him* he was being terminated for his performance at the Indianapolis race. Nonetheless, Hess testified that no NHRA supervisor at any point ever

told him that there were things that weren't found or that he needed to be more organized on Friday or Saturday. Moreover, there is no record evidence that Hess was reprimanded or disciplined at the Indianapolis race for anything.

Skorich's own recorded statements show that there was no discussion or even mention of the reason the Respondent would eventually use to justify Hess' termination. Skorich makes absolutely no remarks that video did not air, clips did not air, the impact Hess had on the live broadcast on Monday, September 5th's, the importance of particular clips to the Respondent's Mello Yello sponsor, etc. Any of these facts go to the heart of the Respondent's defense for terminating Hess. Skorich failed to mention any facts relevant to the Respondent's stated reason for terminating Hess because Respondent did not terminate Hess for clips failing to air during the live broadcast on Monday, September 5, 2016 at the Indianapolis race weekend.

The record evidence supports the inference that the reasons provided by Skorich to Hess at the time of Hess' termination were advanced to mask Respondent's unlawful conduct.

- i. Event Worker Report For Hess Is Unreliable and The Reason Asserted Therein Should Not Be Relied Upon

Respondent's handling of Piner's Event Worker Report form establishes that Hess' Event Worker Report offers no probative value. The record establishes that Respondent submitted an Event Worker Report in the representation case on December 9, 2016 to substantiate its claim that Graphics operator Piner was terminated and thus ineligible to vote. The preponderance of the evidence establishes that the Respondent fabricated Piner's Event Worker Report form and "cause for separation" therein, since Piner was not terminated at any time. Moreover, Respondent produced a second Event Worker Report form for Piner with the same exact dates as his alleged termination but citing lack of work as the reason for his cause for separation. Vice President of Human Resources Gurrola provided no explanation for the inconsistencies between

the two forms. Instead, Gurrola testified that she may back date forms when a supervisor tells her that the supervisor no longer wishes to employ the person. In Piner's case, there can be no doubt that the reason for Piner's form reflecting he was terminated for unacceptable performance was the representation case. Furthermore, in Piner's case the evidence is clear that Respondent no longer wished to offer Piner work for the 2017 season because he voted in the Union election. The record clearly establishes anti-union animus directed toward Piner's protected activity.

An animus finding, based on Respondent's handling of Piner's Event Worker report is appropriate with regard to Hess' Event Worker report. In *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, passim (2000), enfd. mem. 11 Fed. Appx. 372 (4th Cir. 2001), the Board adopted the judge's animus findings relying on a prior Board decision regarding the employer there and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees. Here, Hess' Event Worker Report was submitted in the representation case on December 9, 2016 along with Piner's form. The Event Worker Report does not state the reasons given to Hess by Skorich over the telephone on September 14, 2016 for his termination. The form states, "Termed for performance quality was subpar material not ready for TV Production." Lastly, the date written on Hess' event worker report indicates Hess was terminated on September 7, 2016. Yet, Rokosa testified that no determination was made on Respondent's initial call about Hess' termination on either September 7 or 8. Based on Respondent's propensity to create documents to suit its interests, a finding is warranted that Hess' Event Worker Report is unreliable.

b. Claims Made By Respondent In Its Position Statement Regarding Hess' Termination Show Pretext

When an employer provides shifting reasons for discharging an employee, the Board has found that the proffered reasons are pretextual and the real reason is animus. *Seminole Fire*

Protection Inc., 306 NLRB 590 (1992). In *Taylor Made Transportation Services, Inc.*, 358 NLRB 427, 432 (2012), the Board affirmed the administrative law judge's finding that an employer showed animus toward an employee's protected conduct when as a defense to the unfair labor practice charge it claimed the employee was terminated due to "poor work performance," lack of professional behavior," and for violating its cell phone usage policy, despite never having provided the employee with those reasons in prior meetings.

Here, the Respondent claimed in its position statement dated April 12, 2017 that Hess was dishonest in the preproduction meeting on Monday September 5, 2016. Respondent claimed that Hess stated he had certain clips during the meeting but did not have the clips later in the day. However, there is no record testimony on this point. Rokosa and Adelson both testified to what generally happens at production meetings and that a rundown was distributed at the preproduction meeting. Hess testified to what his responsibilities were in the preproduction meeting. Hess further testified that he did not have access to the rundown sheet during the preproduction meeting because his rundown sheet was in Mobile Unit A which was locked. Other than the foregoing testimony, there is absolutely no record evidence as to what happened in the pre-production meeting. Thus, the Employer's claim that Hess was dishonest to Producer Skorich in the pre-production meeting is unsubstantiated. Respondent's claim about Hess' dishonesty is just more evidence of animus.

The record evidence further shows that in its position statement dated April 14, 2017, Respondent claimed that Hess had behavioral problems throughout the season, and cited Hess' performance [when the segments failed to air] and "behavior" as being incompatible with "professionalism" as a reason for firing Hess. The Respondent claimed that Hess was argumentative, uncooperative and combative toward Producer Skorich. Skorich did not testify at

the hearing. In that regard Respondent claimed, “Mr. Hess’s performance and behavior was incompatible with the professionalism demanded by the job and the telecasting network. NHRA could *no longer risk* jeopardizing its television productions by inviting Mr. Hess back.” In other words, Hess’ alleged behavioral problems were part of the reason Hess was fired, and the Indianapolis race was the culmination of Hess’ offenses. Contrary to Respondent’s claim, Skorich never raised Hess’ behavior as being part of the reason for his termination on September 14, 2016. Furthermore, Hess denied ever being reprimanded for any reason including “yelling” or “arguing” with Producer Skorich. Therefore, Respondent’s proffered reasons for Hess termination are pretextual.

Further, the Board has long held that an employer who freely tolerates conduct may not find it offensive only when committed by an employee who exercises his or her right to engage in concerted activity. *Apico Ins of California, Inc., d/b/a Holiday Inn of America of San Bernardino*, 212 NLRB 280 (1974); *see also Shasta Fiberglass Inc.*, 202 NLRB 341 (1973). The Respondent’s tolerance of Hess’ alleged behavioral problems until learning of Union activity further demonstrates that the Respondent harbored anti-union animus. The record establishes that Hess was employed by Respondent from February 2016 through September 2016 but the record establishes that Hess was not reprimanded or disciplined in any way until his discharge. Therefore, any behavioral issues Hess might have had, Respondent tolerated them until it learned of Union activity at the Indianapolis race.

The only evidence on the record suggesting that Respondent took any issue with Hess was early in the season in March 2016. Respondent produced an email dated March 23, 2016 in which Producer Skorich characterized Hess as a “wildcard but hopefully trainable.” (ER Ex. 8). Executive Adelson responded that he was not thrilled with Hess’ overall performance. (ER Ex.

8). Yet, the Respondent continued to employ Hess without incident. Indeed, the record establishes that soon after Respondent's March 23, 2016 email, in April 2016 Skorich began having conversations with Hess about a raise conditioned on Hess incorporating elements into the show, and eventually in August 2016, agreed to granting Hess a raise as well as a promise for a better deal the following year. The record further establishes that Adelson authorized Hess' raise for \$2.50. Therefore, the record proves that any behavioral or performance issues that Respondent may have had with Hess subsided by the time Hess received his raise on September 1, 2016. Respondent's claim of Hess' behavior problems is another example of animus.

Likewise, at the hearing Respondent raised claims about Hess' alleged unauthorized Wednesday travel work and overtime which was raised by Rokosa in Respondent's March 23, 2016 email. (ER Ex. 8). Rokosa testified that Hess consistently lacked authorization, had several travel requests denied, and was sent written multiple notices telling him to "act in accordance with what he was told." Rokosa egregiously misrepresented the facts in an attempt to discredit Hess as a credible witness and good employee. Contrary to Rokosa's testimony, the evidence establishes that Hess consistently sought and received authorization to travel work on Wednesdays from Skorich. Hess was denied one request to do so, and was never reprimanded or corrected by Rokosa. Nonetheless, following Respondent's own argument that Hess consistently worked unauthorized Wednesday travel work supports a finding that Respondent had tolerated Hess' misconduct until the Union activity at Indy.

c. Respondent Supervisor Hedrick's Testimony Supports an Inference that Hess Was Discharged for Union Activity Because it Includes New Allegations of Misconduct Raised for the First Time at the Hearing

The Board has consistently held that raising new allegations of misconduct for the first time at a hearing leads to the reasonable inference that that the real reason was protected activity. *See Lucky Cab Co.*, 360 NLRB 271, 274 (2014) (finding that Respondent's pretextual reasons

for discharges support animus finding, including manager giving new reasons for discharges at the hearing); *See also GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) (“where, as here, an Respondent provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive”) citing *Trader Horn of New Jersey, Inc.*, 316 NLRB 194, 199 (1995) and *Dumbauld Corp.*, 298 NLRB 842, 848 (1990).

The Employer raised a new assertion of wrongdoing by Hess at the hearing through Director of Broadcasting Hedrick. Neither in its position statement nor in the testimony of Adelson or Rokosa, did the Respondent ever claim that the “PitFit” clip was one of the clips that did not air on Monday, September 5, 2016. Yet, Hedrick identified the Pitfit clip as one of the clips that did not air on Monday, September 5, 2016. Furthermore, Respondent never claimed before the hearing that Hess misplaced clips on Monday, September 5, 2016. The September 14, 2016 email written by Skorich cites Hess not having been organized earlier in the weekend at Indianapolis as a reason given to Hess for his termination. In a post hoc attempt to substantiate Skorich’s claim, the Respondent sought testimony from Hedrick that Hess was unorganized. Hedrick testified that in his opinion Hess was an unorganized tape producer and that as a result there was lack of organization in the tape room on Monday, September 5, 2016. (Tr. 703:3-4; 706:12-16). Yet, the record establishes that Hedrick has no basis for forming an opinion as to Hess’ ability as a tape producer; Hedrick testified he did not supervise Hess, he never held a tape producer role, and was not on the truck for the duration of the entire live broadcast.

Hedrick further testified that he brought Hess the same clip multiple times after Producer Skorich or Executive Producer Adelson made him aware that clips were missing. However, Adelson did not testify that Hess misplaced clips on Monday, September 5, 2016. Instead, the

Respondent planned to offer into evidence an out of court declaration from Editor/Camera Operator Lauren Adams to support Hedrick's testimony that Hess misplaced clips. The record establishes that Hess was not spoken to about at the Indianapolis race about anything.

The Respondent's allegation that the PitFit clip failed to air and Hess misplaced clips are never before raised additional assertion of misconduct by Hess. In view of the record as a whole, leads to a reasonable inference that Hess' termination was pretextual.

- i. Hedrick's Testimony Shows that the Respondent Violated the Sequestration Order When it Created Employer Exhibit 9 (Screenshot of Folder on EVS Network)

The record establishes the issuance of a sequestration order. The judge stated in pertinent part, "The sequestration also prohibits all witnesses from discussing with any other witness, or possible witness, the testimony they have already given or will give." (Tr. 16:20-23). The issuance of a sequestration order is necessary to finding a violation of the order itself. *U.S. v. Williams*, 136 F.3d 1166, 1168-1169 (7th Cir. 1999).

Hedrick's testimony suggests that other Employer witnesses may have discussed with Hedrick trial testimony which led him to create Employer Ex 9. The record reflects that Hedrick created the document within days of Administrative Law Judge Green asking Technology Executive Rokosa questions about the clips that failed to air. The judge asked Rokosa if there was a way to determine when the Del Worshom Mello Yello clip that he allegedly found on the EVS network was transmitted onto the network from the X-File. Rokosa testified that he did not know if the Mello Yello clip had a time stamp because no investigation had been done. The judge also asked Rokosa if he knew whether the other three clips ever made it into the EVS server. Rokosa testified that he did not know if the other three clips were ever transmitted onto

the EVS server. Rokosa testified on March 5, 2018. Hedrick testified that he created ER Ex. 9 sometime between March 6 to March 8, 2018. Hedrick then admitted that he created ER Ex. 9 after Executive Producer Adelson asked him “if there’s any way to find the time stamp on a file” and the “the judge had asked about a time stamp.” *See* Tr. 7:13:8-9; 11-13. Hedrick repeatedly testified that he was asked by Adelson about a single file’s timestamp. *See e.g.*, (Tr. 713:17-18; 716: 2-4; 719:3-4).

Hedrick’s creation of ER Ex. 9 is merely the Employer’s attempt to create evidence responsive to the judge’s questions. Based on the foregoing, Hedrick’s testimony about the creation of ER Ex. 9 supports a finding that Hedrick discussed, at least with Executive Producer Adelson, hearing testimony in violation of the sequestration order. An appropriate remedy in the instant case is stricter scrutiny of Hedrick’s testimony. *See Medite of New Mexico Inc.*, 314 NLRB 1145, 1149 (1994) *enfd.* 72 F .3d 780 (10th Cir. 1995).

B. The Respondent Threatened Employees With Unspecified Reprisals, Solicited Grievances, Created An Impression of Surveillance, and Informed Employees Union Representation Would Delay Job Offers In Violation of Section 8(a)(1) of the Act

1. Respondent violated the Act by soliciting employees’ complaints and grievances implying that it would fix them in order to discourage employees from supporting the Union

When a Respondent implements a new practice of soliciting employees’ grievances during a union organizational campaign, “there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging his employees that the combined program of inquiry and correction will make union representation unnecessary.” *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992), *citing Reliance Electric Co.*, 191 NLRB 44, 46 (1971). In *Reliance Electric* the Respondent had no practice of soliciting

employee grievances, but began to do so by holding meetings during the course of the Union's organizational campaign. The Board noted that the Respondent's phrasing of its replies in circumspect terms as undertaking to "look into" or "review" employee complaints did not cancel the employees' anticipation of improved conditions if the employees oppose or vote against the union. *See Reliance Electric* at 46.

It is undisputed that at the Charlotte, North Carolina race, in September 2016, Respondent began its new practice of soliciting employees' grievances. At Respondent's meeting with the production crew on September 16, 2016, Gurrola solicited their grievances in order to discourage them from selecting the Union as their collective bargaining representative. Her words were straightforward: "if you have any issues or anything you wanted to discuss . . . you can come to me. Bring them to our attention," she urged them, "and we'll, you know, we'll look into it," adding "I mean, give us an opportunity to fix issues." It was a clear invitation to employees to bring their problems to management so they could be remedied as the Board found in *Embassy Suites Resort*, supra.

The record evidence demonstrates that she continued her pursuit of employees' grievances for months. By her own words she testified that she attended only the first race of the season and no other races until the Charlotte, North Carolina race, immediately after learning of Union activity during the Indianapolis race. The record evidence establishes that she then attended the last six consecutive races of the season. In the last six races of the season during which Gurrola had frequent conversations with small groups of crew members in which she spoke to them about their work-related complaints. She took notes of these conversations and kept track of their numerous complaints.

Moreover, Respondent's goal to convince the employees that "union representation [is] unnecessary" was further demonstrated when it changed its very unpopular practice of deducting from the employees' per diem when Respondent provided meals at races. Within days after the employees complained to Gurrola, Respondent changed the policy by giving employees an option to have a per diem that Respondent would not decrease when it provided meals. Clearly, Respondent was attempting to convince its employees that it could correct their problems without union involvement.

2. Respondent violated the Act by threatening its employees with unspecified reprisals by telling employees there would be consequences to joining a Union.

A Respondent violates Section 8(a) (1) by acts and statements reasonably tending to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Board employs a totality of circumstances standard to distinguish between Respondent statements that violate Section 8(a)(1) by explicitly or implicitly threatening employees with loss of benefits or other negative consequences because of their [protected concerted] activities, and Respondent statements protected by Section 8(c). The Board has also observed that, "[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group*, 339 NLRB 303 (2003). "In considering whether communications from a Respondent to its employees violate the Act, the Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 52 (2006).

At its Charlotte, North Carolina meeting, Respondent engaged in additional unlawful activity when Vice-president Gurrola threatened employees. During her speech to employees,

Gurrola threatened employees with unspecified reprisals when she stated “we don’t feel that it is . . . a productive . . . relationship to get into. . . there are consequences, okay?” She added, “to make this a good working relationship between the two of us. When you bring the union in, that model goes out the door.” Gurrola was telling the employees that the Union’s representation was going to impact them negatively, destroying the “good” relationship they had with management. The word “consequences” itself has a negative connotation. Clearly, she was telling them that things would get bad if the Union represents them. In these circumstances such statements are clearly coercive. By these words Respondent was attempting to further discourage support of the union thereby interfering with their free exercise of their Section 7 rights.

3. Respondent violated the Act by creating the impression that its employees’ Union activities were under surveillance

The test to determine whether a Respondent has created an unlawful impression of surveillance is whether “under all the relevant circumstances reasonable employees would assume from the statement in question that their union or protected concerted activities have been placed under surveillance.” See *Remington Lodging & Hospitality*, 363 NLRB No. 6 (2015). Such statements violate 8(a)(1) because the employees are left to speculate and reasonably conclude, that the Respondent obtained the information through unlawful surveillance. See *Jennie-O Foods*, 301 NLRB 305, 338-339 (1991)(where the Board found that the Respondent created an impression of surveillance where the plant manager stated that he heard that an employee was “getting into politics”); and see *Emerson Electric Co.*, [287 NLRB 1065 \(1988\)](#) (where the Board found that an impression of surveillance was created where the plant manager indicated that he knew the extent of the employee's involvement with the union.)

In Gurrola's Charlotte, North Carolina presentation she directly referred to employees' union activities. She told the employees, "I know that some of you have been approached and talked to about perhaps going in the union ..." and "you may or may have not been asked to sign a card to join the union." Such statements convey the impression that union activity was under surveillance. At that point the Union had not filed a petition nor had the employees engaged in any public Union activity, but the record evidence shows that at the time of Gurrola's Charlotte speech, employees had been given authorization cards and some had signed them. Gurrola provided no explanation of how Respondent knew that employees had been approached by the Union or had been given Union cards to sign. Instead, these employees were left to speculate as to how Respondent knew that employees were involved in a Union organizing campaign, thus, leading to the inescapable conclusion that their union activities "were under the watchful eye of management," *Tre Estrellas de Oro*, 329 NLRB 50, 51 (1999).

4. Respondent violated the Act by informing employees that Union representation would delay it in making job offers to them for the 2017 season

The Supreme Court has established that in the context of an election campaign for union certification, a Respondent can state to employees a prediction, whether explicit or implied, of the effect of unionization if it is:

[C]arefully phrased on the basis of objective fact to convey a Respondent's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization If there is any implication that a Respondent may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him. The statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

The Board has held that although an employer's warnings of 'serious harm' that may befall employees who choose union representation are not unlawful in and of themselves, they

may be unlawfully coercive if uttered in a context of other unfair labor practices that ‘impart a coercive overtone’ to the statements. *Community Cash Stores*, 238 NLRB 265, 269 (1978), citing *Greensboro Hosiery Mills*, 162 NLRB 1275, 1276 (1967), enf. denied in relevant part 398 F.2d 414 (4th Cir. 1968).

Respondent violated the Act by sending employees the November 15, 2016, email in which (GC Ex. 6) Respondent told employees that job offers for the 2017 season would not be made **until** the resolution of the Union’s status, thereby coercing and implicitly threatening its employees as they were about to cast their ballots. Respondent made it clear that if the Union lost “we will be able to tell you **promptly** when we can schedule you to work.”(emphasis added). However, it added “if the [U]nion wins we do not know how long [bargaining] might take” implying that if employees vote the Union in, then job offers **will not** be prompt. Granted, if the Union won Respondent would be required to bargain over terms of employment, but that would not have prevented Respondent from offering employment to the employees for the 2017 season which was weeks away from starting in February 2017. Respondent offered no evidence into the record that the timing of job offers was beyond its control. Rather, it is apparent that Respondent’s email was not based on an objective fact such as an employee’s availability, but upon employees exercising their Section 7 rights. As a matter of fact, Adelson admitted that some proposed bargaining unit members were made verbal offers prior to November 15, 2016. When examined in light of Respondent’s litany of previously described unlawful actions -- Nate Hess’s termination, Gurrola’s repeated solicitation of grievances during the last weeks of the season, Gurrola’s threat of unspecified reprisal and her creating the impression that management was watching employees’ union activities -- all occurring within a short period of time, the coercive overtone in this management communication is undeniable. In

sum, the record evidence supports a finding that the email threatened employees with retaliation if they voted for the Union, thereby making it coercive in nature and unlawful.

C. Credibility Determinations

1. Executive Producer Adelson's Testimony is Unreliable

Adelson's testimony about the clips failing to air is full of general statements, and hyperbole. Adelson's testimony is mainly based on a document, ER Ex. 4 (Rundown), that he did not create. The Respondent admitted ER Ex. 4 through Adelson which allegedly purported to show the clips that did not air on Monday, September 5, 2016. Adelson testified that his assistant Barbara Dewey made most of the markings on the document including the words "Yes" and "No" for the purpose of checking which clips made it to air. (Tr. 559:21-25). Based off of Dewey's entries, Adelson's testimony consisted of him confirming that the clips that read "No" did not air, describing the contents of the clip, and giving some narrative about Hess being responsible for the clip failing to air or the importance of the clip. (Tr.548:3-25—553:1-13). Adelson testified that at the end of the day on Monday, September 5, 2016 management did nothing with respect to the clips that did not air. (Tr. 553:14-18). Adelson's testimony provides absolutely no details about what happened in real time on the day in question itself, including him being present at the time the clips failed to air. Adelson testified that, on either September 7 or 8, 2016, he *talked* with Rokosa and Skorich about the "impact it had in the control room at that time." (Tr. 554:20-24). Adelson then went on to describe the impact in more generalities. Adelson testified, "so, when a clip just doesn't run, now all of a sudden, you've got a – the producer has to figure out – so the announcer says, "And now let's take a look at this," and it doesn't happen. So he's got to figure out what to do and what the next shot is got to be. But at that point, he then has to communicate quickly to everyone in that room what's going to happen next and where they are going to go and how to make it look as seamless as possible on TV."

(Tr. 555:5-12). Adelson never outright testified that he was present in the truck when the clips didn't air. Adelson testified, "I was aware the clips didn't run. It happened in this egregious manner, as I stated earlier, that I had never seen before, on our most important show of the year, in a short time frame, and so I was aware that clips didn't run." (Tr. 567:2-6). The closest Adelson got to establishing he was present was counsel saying "You lived it." Adelson responded, "I lived it." (Tr. 567:7-8). The record is devoid of any testimony from Adelson placing him in the truck at the time any clip failed to air. (*See e.g.*, Tr. 548:3-25—553:1-16; 554:20-25—555:1-14; 566:22-25—567:1-8).

With respect to the decision to terminate Hess, Adelson's testimony was similarly general and full off hyperbole. Adelson provided absolutely no detail about his conversations with management about Hess' failure to find the clips. Adelson testified, "And then after that discussion, I made the decision that the person who was involved in, and I'm guessing responsible for it, was not somebody that could be part of our show. That was going to put our show in jeopardy. And not knowing, having any confidence about something running – running forward. So therefore, I made the decision to basically terminate Mr. Hess's employment with us." (Tr. 557: 9-15). Adelson testified that Rokosa and Skorich were "distracted." Adelson testified that he didn't have conversations with the NHRA sponsor about the Del Worshom Mello Yello clip failing to air. (Tr. 553:22-24). Yet, Adelson testified that CEO Peter Clifford said the sponsor was "very upset." The only detailed testimony provided by Adelson was that on management's initial call about Hess' termination, September 7th or 8th, Rokosa told Adelson that the Mello Yello Clip was on the server, nothing more.

D. Respondent's Failure to Call Producer Skorich Leaves Gap in Respondent's Defense

The record is replete with uncorroborated testimony about what Producer Skorich did, and said. Producer Skorich's testimony is indispensable to the Respondent's *Wright Line* defense. The Respondent cannot sustain its burden without Skorich's testimony. First and foremost, it is undisputed that Skorich was Hess' direct supervisor, an admitted 2(11) supervisor. Skorich terminated Hess and gave Hess the reason for his termination on September 14, 2016. The evidence shows that Skorich did not give Hess the same reason asserted by the Respondent in this case. Skorich told Hess that he was being terminated for problems in the tape room at Indianapolis on Friday. Skorich did not tell Hess that the clips that failed to air had anything to do with his termination. Moreover, Skorich admitted to Hess on the September 14, 2016 telephone call that he knew that the X-File malfunctioned on Monday, September 5, 2016. Skorich's September 14, 2016 email memorializing his call with Hess to NHRA management corroborates Hess' testimony in this regard.

The record contains unrebutted testimony from General Counsel's witnesses attributing statements to admitted 2(11) supervisor Skorich. Editor Raposo testified that Skorich said, between the period when the Respondent learned of Union activity and Hess was discharged, that the Union guys would "get taken care of" and "nipped in the bud." Hess testified that Skorich routinely praised his work. Hess further testified that along with approving his raise in August 2016, Skorich promised Hess a "better deal for next year." Skorich's statement about Hess working in the following season shows that Skorich was pleased with Hess' work and expected to hire Hess the following season. Skorich's statement came just one month before Hess was terminated. None of these critical facts were rebutted or contradicted by evidence presented by the Respondent.

Further, the Respondent maintains that clips failed to air because Hess could not find them, and that Hess failed to provide the Respondent any advance notice that he could not locate the clips. Rokosa testified that Hess gave Producer Skorich no advance notice of the four clips being unavailable. (*See e.g.*, Tr. 683:20-25—684:1-24). However, there is no dispute that Skorich, by virtue of his position as the show’s producer, was Hess’ direct line of communication during the live show. Skorich is in the best position to establish, what if any notice Hess gave him, not Rokosa. Indeed, Rokosa’s personal knowledge of what happened at the time the clips failed to air is limited. Rokosa testified that he was on the truck only when one of the clips failed to air—not four clips. Skorich’s testimony about what happened at the time the clips did not air would provide a firsthand and comprehensive account of what happened as opposed to the testimony of Rokosa and Adelson. The Respondent’s defense has a gaping hole without the first-hand account of Skorich.

E. The Evidence Establishes that Hess’ Union Activity Was a Motivating Factor in His Termination

The evidence firmly supports that Hess engaged in Union activity by distributing Union cards and attending Union meetings at the Indianapolis race about ten days before he was fired, knowledge of Union activity spread quickly at the Indianapolis race—the Respondent had every reason to know of Hess’ Union activities, and that Respondent harbored intense animus against the Union and Hess’ Union activities. The General Counsel has thus established a prima facie case of discrimination against Hess in violation of Section 8(a)(1) and (3) of the Act, and under the Board’s *Wright Line* burden-shifting analysis, the burden of persuasion must then shift to Respondent to affirmatively prove that unlawful considerations played no part in its decision to discharge Hess.

F. The Respondent Failed to Meet Its Burden to Establish that It Would Have Discharged Hess Even Absent His Protected Activities

The Respondent claims it terminated Hess because four clips failed to air during the biggest race of the year on Monday, September 5, 2016 at Indianapolis. Yet, there is an overwhelming amount of pretextual and uncorroborated evidence that the Respondent cannot overcome. The Respondent cannot satisfy its standard of persuasion by a preponderance of the evidence because it failed to call Hess' direct supervisor Peter Skorich as a witness. Skorich was Hess' point of contact during the live broadcast on Monday, September 5, 2016. Without Skorich's testimony the Respondent cannot support any claim that Hess did not provide Skorich sufficient advance notice about the clips.

With regard to the reason for Hess' termination, Hess testified that Skorich told Hess he was being terminated for some alleged performance issues earlier in the weekend on Friday, September 2, 2016—just one day after Hess' received his performance based raise on September 1, 2016, and before the Respondent learning of Union activity on September 2, 2016. The record is clear that Hess was not spoken to or reprimanded in anyway at any point for any reason during the Indianapolis race weekend. Producer Skorich never once mentioned to Hess that the clips failing to air had anything to do with his termination. The likelihood that the Respondent experienced a major incident on one of its biggest shows of the year and did not at any point mention the impact to Hess is highly unlikely.

Furthermore, the Respondent cannot satisfy its burden because the Respondent witnesses are simply not credible. The record is clear that the Respondent conducted no investigation into Hess' termination despite knowing that the X-File experienced problems at least earlier in the weekend. Respondent waited over a week to terminate Hess after this purportedly extraordinary

event on Monday, September 5, 2016, and contrary to the record evidence Adelson attempted to deny knowledge of problems with the X-File at any point during the Indianapolis race weekend.

Rokosa's testimony is similarly not credible, and otherwise inconsistent and unsupported by evidence. Rokosa testified that he experienced an extraordinary event when the Mello Yello Del Worshom Clip did not air. Rokosa offered hearsay testimony about another crew member finding the clip and showing him the clip on the server. Yet, Rokosa testified that he did not discuss this very important fact until days later on September 7th or September 8th with management. Rokosa never spoke to anyone directly involved with airing clips during the show including Hess, Dean or Engineer in Charge West. Contrary to Rokosa's testimony Director of Broadcasting Hedrick testified that the Del Worshom Mello Yello Clip was not on the EVS network. Hedrick offered new evidence of Hess' misconduct, a document riddled with inconsistencies and no explanation as to where the Mello Yello Clip could have been if Rokosa found it on the server on Monday, September 5, 2016.

Moreover, Rokosa testified that a decision was not made to terminate Hess on the Respondent's initial call about Hess on either September 7th or September 8. Yet, the effective date on Hess' Event Worker Report indicates September 7.th Hess' Event Worker report was submitted on December 9, 2016 along with a fabricated Event Worker Report for Joshua Piner. These hinder the Respondent from affirmatively proving under the Board's *Wright Line* burden-shifting analysis that unlawful considerations played no part in its decision to discharge Hess.

V. CONCLUSION

Based on the foregoing, and the record as a whole, Counsel for the General Counsel submits that the weight of the credible evidence overwhelmingly establishes that Respondent violated Section 8(a)(1) and (3) of the Act as alleged in the Complaint by discharging Nathan Hess because he engaged in Union activity and in order to discourage other employees from

engaging in those activities. The record further establishes that the Respondent violated Section 8(a)(1) of the Act by making unspecified threats of reprisals, creating an impression of surveillance, soliciting grievances, and telling employees that Union representation would delay the Respondent in making job offers. Accordingly, the General Counsel respectfully urges the Administrative Law Judge to recommend a Board Order that adequately remedies these unfair labor practices and requires Respondent to reinstate Hess to his former position of employment, award Hess backpay and otherwise make him whole, and e-mail notices to all current and former members of the petitioned for unit employed at any time since September 14, 2016 advising them of their rights under the Act and assuring employees that Respondent will not continue to engage in the unlawful conduct established in this case.

Dated: May 21, 2018
Brooklyn, NY

Respectfully submitted,

/s/ Evamaria Cox

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/s/ Marcia Adams

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

NATIONAL HOT ROD ASSOCIATION

and

**Cases 02-CA-185569
 22-RC-186622
 22-CA-190221
 22-CA-192686**

**INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES, MOVING PICTURE
TECHNICIANS, ARTISTS AND ALLIED CRAFTS
OF THE UNITED STATES, ITS TERRITORIES
AND CANADA, AFL-CIO, CLC**

MOTION TO CORRECT TRANSCRIPT

Counsel for the General Counsel moves to correct the transcript in the manner set forth in the attached chart so that it may accurately reflect the proceeding. All references are to page and line number in the transcript.

Dated: May 21, 2018
Brooklyn, NY

Respectfully submitted,

/s/ Evamaria Cox

Evamaria Cox

/s/ Marcia Adams

Marcia Adams

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National Labor Relations Board

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Counsel for the General Counsel's Proposed changes to Transcript

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**CERTIFICATE OF SERVICE: Post-hearing Brief to the Administrative Law Judge
and Motion to Correct Transcript**

I certify that on May 21, 2018, I served the above-entitled document(s) by **electronic mail**, as noted below, upon the following persons:

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